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APPEAL OF BRISTOL BAY NATIVE CORP.*

4 ANCAB 355

Decided *July 31, 1980*

Motion of the Bureau of Land Management for reconsideration of the Final Order of the Alaska Native Claims Appeal Board in Appeal of Bristol Bay Native Corp., 4 ANCAB 222, 87 I.D. 164 (1980) [VLS 80-2], granted. Request of Bristol Bay Native Corp. for clarification and for reconsideration and amendment of order granted in part, denied in part.

Final Order affirmed in part, modified in part.

1. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication

When the Bureau of Land Management redetermines its own finding of navigability which would result in a change from its published Decision to Issue Conveyance, and when the Bureau of Land Management has, or is given, jurisdiction to make such redetermination, then that redetermination is itself a decision requiring public notice through publication in accordance with 43 CFR 2650.7.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication

Redetermination by the Bureau of Land Management of navigability of water bodies while jurisdiction over the subject water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

3. Alaska Native Claims Settlement Act: Navigable Waters—Alaska: Navigable Waters: Generally

Where the Bureau of Land Management has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which the Bureau of Land Management made its redetermination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication

Decisions by the Alaska Native Claims Appeal Board, made pursuant to its authority in 43 CFR 4.1(b)(5), are not decisions of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

5. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication

Redetermination by the Bureau of Land Management from nonnavigability to navigability of water bodies not the subject of an appeal is a decision "proposing to convey lands," and notice thereof must be given pursuant to 43 CFR 2650.7(d).

*Not in chronological order.

APPEARANCES: Thomas S. Gingras, Esq., on behalf of Bristol Bay Native Corporation; Robert C. Babson, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; James T. Brennan, Esq., Hedland, Fleischer and Friedman, on behalf of Alaska Peninsula Corporation.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This reconsideration concerns a situation in which the Bureau of Land Management found two water bodies to be nonnavigable and published a Decision to Issue Conveyance reflecting that finding. The finding was appealed. Upon review of its own record, the Bureau of Land Management notified the parties to the appeal it had redetermined its own finding. At this point in the proceeding, the Bureau of Land Management and the appellant agreed the water bodies were navigable, while the published Decision to Issue Conveyance reflected that the water bodies were not navigable.

The Board, by Final Order, dismissed the appeal and ordered the Bureau of Land Management to amend the Decision to Issue Conveyance to reflect its redetermination of navigability, and to give public notice through publication pursuant to 43 CFR 2650.7. Both the Bureau of Land Management and appellant objected to the Board's order to give public notice. The Bureau of Land Management argued that a redetermination of an issue under appeal was not a decision requiring publication.

The Board, in issuing its Final Order, intended to return jurisdiction to the Bureau of Land Management so that the decision to exclude the water bodies would have been that of the Bureau of Land Management, and would have been within the Bureau of Land Management's jurisdiction to make. The Board restates its previous finding to clarify that the Bureau of Land Management must give public notice of its own redetermination after publication of a Decision to Issue Conveyance only when it has jurisdiction to make such redetermination. At the same time the Board finds an alternative to dismissal and republication. The Board finds that under certain circumstances, upon notice of an internal redetermination of navigability by the Bureau of Land Management of a water body under appeal, the Board may rule on the record rather than return jurisdiction to the Bureau of Land Management for a new publishable decision.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the follow-

ing findings, conclusions and Decision.

PROCEDURAL BACKGROUND

The above-referenced decision of the Bureau of Land Management (BLM) approved the conveyance to Kokhanok Native Corp. (Kokhanok) of the surface estate of certain specified lands and conveyance of the subsurface estate of the same land to Bristol Bay Native Corp. (BBNC).

On Jan. 11, 1980, BBNC appealed said decision "insofar as it (1) constitutes a determination that Gibraltar Lake and Kokhanok Lake are non-navigable and (2) purports to charge the land submerged beneath those lakes against BBNC's acreage entitlement under Sections 12(a) and 14(f) of the Alaska Native Claims Settlement Act."

Subsequently, while the appeal was pending, the Alaska State Director, BLM, concurred in two separate BLM redeterminations that Kokhanok Lake, Gibraltar Lake, and several other water bodies are navigable. The BLM accordingly on Mar. 11, 1980, filed a request for final order, which request stated that no dispute remains among the parties to the appeal and that the Board's issuance of a final order directing interim conveyance (IC) would be appropriate. The request, as modified on Apr. 1, 1980, suggested the exclusion from the IC of the submerged lands underlying Kokhanok Lake, Gibraltar Lake, and the several other water bodies newly determined to be navigable, on the basis that such submerged lands are not considered "public lands." BLM's request also indicated that, following such exclusion, the acreage of the submerged lands underlying the specified water bodies would not be charged against BBNC's or Igiugig Native Corporation's acreage entitlement under the Alaska Native Claims Settlement Act (ANCSA).

BBNC concurred in the BLM's motion except to point out that reference should have been made to Kokhanok Native Corporation or Alaska Peninsula Corp. (APC), with which Kokhanok has merged, rather than to Igiugig Native Corp.

APC subsequently appeared and, referring only to Gibraltar Creek (one of the water bodies newly determined navigable), stated that it did not oppose the redetermination nor its inclusion in the final order, if such had no effect on the reservation of easements contained in the Decision to Issue Conveyance (DIC). BLM responded that it does not, as a result of any of the navigability redeterminations filed with the Board as of Apr. 1, 1980, propose to seek any easements not already proposed in the DIC.

The Board, in its Final Order issued May 6, 1980, ruled that BLM's redetermination of the navigability of Kokhanok Lake and Gibraltar Lake, when put into effect, would obviate the basis for the appeal and eliminate all the issues therein. Finding that no reasons

justifying the continuance of the appeal were apparent, the Board dismissed the appeal. In so doing, the Board held that any redetermination of navigability which modifies a published decision is in itself a decision requiring publication in accordance with the provisions of 43 CFR 2650.7.[1] The Board also noted, in regard to APC's request that a redetermination of Gibraltar Creek as navigable not result in new easements, that public easements are established pursuant to statutory and regulatory requirements, that they are not a matter which can be disposed of through stipulation by parties to an appeal, and that the BLM is authorized and obligated, upon redetermination, to establish any additional easements required by law.

The BLM, arguing that the publication requirements of 43 CFR 2650.7(d) are not applicable to its subject redeterminations of navigability, moved for reconsideration of the Board's final Order. As to water bodies which are the subject of appeal, BLM argued that the requirements of 43 CFR 2650.7(d) are not applicable because BLM's redetermination represents an admission by BLM of the substantive merits of the appeal and is not a "decision by the Bureau" required by 43 CFR 2650.7(d) to be published. As to water bodies which are not the subject of appeal, where the BLM's redetermination is from nonnavigable to navigable, the BLM argued that 43 CFR 2650.7(d) is not applicable because the redetermination constitutes a decision *not* to convey the submerged lands underlying the water bodies.

BBNC filed a document entitled Statement of Position; Request for Clarification; and Request for Reconsideration and Amendment of Order. Therein, BBNC stated its understanding of what BLM had stated with regard to BLM's not proposing any additional easements as a result of navigability redeterminations filed with the Board as of Apr. 1, 1980. BBNC requested that the Board, "[i]n the interests of clarity, * * * require BLM to state whether its (BBNC's) understanding is correct."

BBNC also requested that the Board reconsider its order requiring republication as to the water bodies appealed by BBNC. BBNC argued that BLM's "redetermination" as to Kokhanok and Gibraltar Lakes is nothing more than a concession of the merits of BBNC's appeal, and should be so treated by the Board. BBNC argued that this variety of "redetermination" should not require republication.

DECISION

As to water bodies which are the subject of appeal, BLM's argu-

[1] Sec. (d) of 43 CFR 2650.7 provides in pertinent part:

"For all land selections made under the act [ANCSA], in order to give * * * [constructive] notice of the decision of the Bureau of Land Management proposing to convey lands, * * * notice of the decision shall be published once in the FEDERAL REGISTER and, once a week, for four (4) consecutive weeks, in one or more newspapers of general circulation in the State of Alaska nearest the locality where the land affected by the decision is situated, if possible."

ment concerning publication requirements pursuant to 43 CFR 2650.7 is correct insofar as it goes. The Board is fully aware that redetermination of an issue under appeal is not a decision by the Bureau as that term is used in 43 CFR 2650.7. When an appeal from a BLM Decision to Issue Conveyance (DIC) is filed with the Board, jurisdiction over the land covered by the decision passes from the BLM to the Board. The BLM lacks jurisdiction over an issue under appeal, so it cannot, during the pendency of an appeal, make a new final decision for the Department concerning such issue. It can, and properly did in this appeal, notify the Board and parties of the result of its own internal review process, an action which might properly be typified an admission of the substantive merits of this appeal. The only question here is how such notification, or admission, should be translated into final action on behalf of the Department of the Interior, and what action, including publication, is required of BLM.

BLM's arguments ignore the effect of the Board's Final Order in this appeal. Aware that BLM lacks jurisdiction to make a new decision on an issue under appeal, the Board dismissed the appeal by order dated May 6, 1980. By dismissing the appeal, the Board returned jurisdiction to BLM for actions appropriate to BLM's assertions that it had internally redetermined its position on the navigability of the water bodies under appeal. By this action, the Board acknowledged that BLM had the authority, once jurisdiction was returned, to correct its own error. The Board now reiterates that BLM has such authority. However, when the BLM does change its own final decision as a result of redetermination, and has jurisdiction to do so, such change falls within the meaning and intent of "decision" as that term is used in 43 CFR 2650.7(d). Therefore, the Board affirms its finding in ANCAB VLS 80–2, but because of the confusion evidenced in the arguments for reconsideration, here restates the finding to clarify any question as to jurisdiction.

[1] When the Bureau of Land Management redetermines its own finding of navigability which would result in a change from its published DIC, and when the BLM has or is given jurisdiction to make such redetermination, then that redetermination is itself a decision requiring public notice through publication in accordance with 43 CFR 2650.7.

[2] The Board also finds, for purposes of clarification, that redetermination by the BLM of navigability of water bodies while jurisdiction over such water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the BLM, and notice is not required to be published pursuant to 43 CFR 2650.7.

When BLM does notify parties that it has, as an internal matter, redetermined navigability of a water body under appeal, the

Board finds there is an alternative to dismissing the appeal and returning jurisdiction to the BLM for publication of its own new finding. Under certain narrow circumstances it is appropriate for the Board to make its own ruling on the record, rather than return jurisdiction to BLM.

[3] Where the BLM has redetermined that water bodies which are the subject of an appeal pending before the Board are navigable, and where the Board finds that the facts in the record upon which BLM made its redetermination meet the essential elements of navigability enunciated in *Appeal of Doyon, Ltd.*, 4 ANCAB 50, 86 I.D. 692 (1979) [RLS 76-2], and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.

In this appeal, the Board finds that the record upon which BLM relied for its redetermination presents facts concerning the use and susceptibility of use of Kokhanok Lake and Gibraltar Lake which meet the essential elements of navigability enunciated in *Appeal of Doyon, Ltd., supra.* The Board further finds that the record discloses no dispute to the facts alleged in support of a finding of navigability.

[4] Accordingly, the Board finds Kokhanok Lake and Gibraltar Lake to be navigable. As the Board has authority under 43 CFR 4.1(b)(5) to "consider and decide finally for the Department appeals to the head of the Department," such finding is not a decision of the BLM, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

As to water bodies not the subject of appeal, the Board is not persuaded by the BLM's argument that since the effect of a redetermination from nonnavigable to navigable is to exclude the underlying submerged lands from the proposed conveyance, such a redetermination is a decision proposing not to convey lands as distinguished from a decision proposing to convey lands. Only the latter is argued to be within the notice publication requirements of 43 CFR 2650.7(d).

The water bodies and the redetermination of navigability thereof are actually part of a broader decision, in this instance BLM Decision AA-6673-A through AA-6673-K. The redetermination of the water bodies as navigable and the decision to exclude the underlying lands from a conveyance under ANCSA is a modification of, and amendment to, a published BLM decision to convey certain lands pursuant to the selection application of Kokhanok Native Corp. Accordingly, notice of such modification must be published pursuant to 43 CFR 2650.7(d).

[5] BLM redetermination from nonnavigable to navigable of water bodies not the subject of appeal, in conjunction with the decision not to convey the submerged lands underlying the water bodies, is a decision "proposing to convey lands,"

notice of which must be given pursuant to 43 CFR 2650.7(d).

BBNC's request for clarification is hereby denied. The statement of the BLM which BBNC seeks to have clarified dealt with the necessity of creating additional easements consequent to BLM redetermination of navigability of a water body not the subject of this appeal. Accordingly, the statement is not within the scope of this appeal, and is not properly the subject of an order of the Board for clarification. Any request for clarification should be directed at the party making the statement rather than at the Board.

ORDER

The BLM is therefore Ordered to exclude the submerged lands underlying Kokhanok Lake and Gibraltar Lake from conveyance under ANCSA to Alaska Peninsula Corp. and to Bristol Bay Native Corp. Notice of such exclusion need not be published under 43 CFR 2650.7. BLM is further Ordered to publish notice, pursuant to 43 CFR 2650.7, of any redetermination of navigability of water bodies within the selection area other than Kokhanok Lake and Gibraltar Lake.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

DRUMMOND COAL CO.

2 IBSMA 189

Decided *August 6, 1980*

Petition for discretionary review filed by the Office of Surface Mining Reclamation and Enforcement from an Apr. 2, 1980, decision by Administrative Law Judge David Torbett in Docket Nos. NX 0-21-P and NX 0-22-P, vacating Notice of Violation No. 79-II-58-15 and reducing the civil penalties assessed for Notice of Violation No. 79-II-58-16.

Affirmed in part, reversed in part, and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." **Where a coal processing facility is owned and operated by the same company that owns and operates the mine supplying most of the coal to the facility, that facility is operated "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 under the circumstances of this case.**

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." **Where a coal processing facility is found to be operated in connection with a surface coal mine and is located less than 15 miles**

from three active surface mining pits, that facility is "near" the minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 under the circumstances of this case.

APPEARANCES: Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Richard E. Dick, Esq., Jasper, Alabama, for Drummond Coal Company.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of the Apr. 2, 1980, decision of Administrative Law Judge (Judge) David Torbett that OSM lacked authority under the Surface Mining Control and Reclamation Act of 1977 (Act) [1] to regulate Drummond Coal Company's (Drummond's) Kellerman preparation plant and that the civil penalties assessed for violations at Drummond's Kellerman Pit #2 should be reduced. For the reasons discussed below, we reverse the conclusion that OSM was without authority to regulate the preparation plant and remand the case to the Hearings Division for a determination as to the validity of the civil penalties assessed against that facility. However, we affirm the decision on the civil penalties assessed against Pit #2.

Background

On June 7 and 12, 1979, OSM inspected Drummond's Kellerman preparation plant, and surface mine [2] in Tuscaloosa County, Alabama. The Kellerman preparation plant, located on the bank of the Black Warrior River, processes and loads coal from three active pits for river barge shipment. Both the plant and the pits are owned and operated by Drummond; the pits are also permitted to Drummond. The three pits are located approximately 7–8, 9–10, and 15 miles from the preparation plant. Drummond's preparation plant also loads coal from Jim Walters Resources, a neighboring mine, under contract with that operation.

As a result of the inspection, OSM issued two notices of violation to Drummond. Notice of Violation No. 79–II–58–15 alleged five violations at the preparation plant: four violations of the sedimentation pond and water quality standards of 30 CFR 715.17 and one violation of the sign requirements of 30 CFR 715.12. Notice of Violation No. 79–II–58–16 alleged two violations at Pit #2: a violation of the sedimentation pond requirements of 30 CFR 715.17 and a failure, by maintaining a coal stockpile

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] There are three active pits at the "mine." It is unclear from the record whether these pits are separate surface mines or whether they are part of the same mining operation. The Board attaches no significance to whether one or three mines are involved in this case.

off the permit area, to have all portions of the surface coal mining operation on its permit in accordance with sec. 502 of the Act (30 U.S.C. § 1252 (Supp. I 1977)).

After receiving notification of the proposed civil penalties on these notices, Drummond requested an assessment conference, which was held on Oct. 11, 1979. Following the conclusion of the conference, Drummond filed for review with the Hearings Division. A hearing was held on Feb. 27, 1980.[3] On Apr. 2, 1980, the Judge confirmed in writing his ruling from the bench which had vacated Notice of Violation No. 79–II–58–15 and sustained Notice of Violation No. 79–II–58–16, but reduced the civil penalties assessed for that notice. OSM petitioned for discretionary review of this decision and filed a brief. Drummond did not file a brief.

Discussion and Conclusions

[1] In *Drummond Coal Co.*, 2 IBSMA 96, 101, 87 I.D. 196, 198 (1980) (*Drummond I*), the Board held that a "coal processing facility * * * owned by a company that supplies that facility from several mines owned by the same company" is operated "in connection with" those mines for the purposes of the definition of surface coal mining operations in 30 CFR 700.5.[4] This case presents essentially the same factual situation. Drummond owns and operates both the preparation plant and the pits which supply coal to it. The one distinction in this case is that Drummond's preparation plant also has a contract to load coal for a neighboring mine that lacks adequate loading facilities. This fact does not alter the common ownership and use connection between the preparation plant and the pits. Therefore, we hold that the Kellerman preparation plant is operated in connection with Drummond's surface mine within the meaning of 30 CFR 700.5.

[2] The Board also held in *Drummond I* that the processing facility, which was 9–30 miles away from the functionally integrated and commonly owned mines supplying it, was "near" those mines within the meaning of 30 CFR 700.5. Here, the active pits are similarly related and owned and are all less than 15 miles from the preparation plant.[5] The

[3] At the hearing, Drummond based its case against Notice of Violation No. 79–II–58–15 on OSM's lack of authority to regulate the preparation plant. Other evidence presented dealt with mitigating circumstances that might justify vacation of or reductions in the proposed civil penalties for both notices.

[4] 30 CFR 700.5 reads in pertinent part:

"*Surface coal mining operations* means—

"(a) *Activities conducted* on the surface of lands *in connection with a surface coal mine* or, subject to the requirements of Section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce *at or near the mine-site.*" (Italics added.)

[5] Because of the disposition of this case and of *Drummond I*, the Board finds it irrelevant whether coal is transported from a mine to a preparation plant over private roads.

preparation plant is, therefore, "near" those pits within the meaning of 30 CFR 700.5.[6]

Because of the Board's conclusion that the Kellerman preparation plant is operated in connection with Drummond's Kellerman surface mine and is near that mine, the plant is subject to regulation by OSM. The decision of the Administrative Law Judge vacating the notice of violation on the grounds that OSM lacked authority to regulate that facility is reversed. The case is remanded to the Hearings Division for a determination of the validity of the civil penalties assessed on that notice.

OSM also sought review of the Judge's reduction of the civil penalties assessed on Notice of Violation No. 79–II–58–16, relating to the two violations at Kellerman Pit #2. The Board sees no reason to disturb the finding below that these civil penalties should be reduced. The Judge's decision is affirmed.

Therefore, the Apr. 2, 1980, decision of the Hearings Division is affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this decision.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

[6] As we pointed out in *Drummond I*, "near" is a relative term, depending for its interpretation on the circumstances of each case.

J. BURTON TUTTLE

49 IBLA 278

Decided *August 18, 1980*

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting offer to purchase lands. W–31177.

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Rules and Regulations—Federal Land Policy and Management Act of 1976: Sales—Public Sales: Preference Rights—Regulations: Interpretation

An assertion of a preference right to purchase public land offered for public sale pursuant to the Unintentional Trespass Act of Sept. 26, 1968, 82 Stat. 870 (43 U.S.C. §§ 1431–1435 (1976)) (now covered by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1722 (1976)), is improperly rejected when the applicant submits satisfactory equitable proof of his "ownership" of contiguous lands by showing that he has contracted to purchase such land, has made at least partial payment, therefor, and is in possession thereof.

Robert A. Davidson, 13 IBLA 368 (1973), overruled to the extent it is inconsistent.

APPEARANCES: J. Burton Tuttle, *pro se.*

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

This appeal is taken from a decision dated Nov. 26, 1979, by the

Wyoming State Office, Bureau of Land Management (BLM), rejecting appellant's offer to purchase the following described lands: lot 2, sec. 4, T. 18 N., R. 88 W., sixth principal meridian, Wyoming.

The tract was offered for sale pursuant to the Unintentional Trespass Act (UTA) of Sept. 26, 1968, 82 Stat. 870, 43 U.S.C. §§ 1431–1435 (1976). UTA authorized the Secretary of the Interior to sell at public auction a tract of public land where such land was not needed for public purposes and upon which there was an unintentional trespass on or before Sept. 26, 1968. It also accorded owners of contiguous lands a preference right to buy such land. Sec. 214 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1722 (1976), carried forth the objectives of the Act of Sept. 26, 1968, as follows:

> (a) Preference right of contiguous landowners; offering price
>
> Notwithstanding the provisions of the Act of September 26, 1968, [43 U.S.C. §§ 1431–35 (1976)] hereinafter called the "1968 Act", with respect to applications under the 1968 Act which were pending before the Secretary as of the effective date of this subsection and which he approves for sale under the criteria prescribed by the 1968 Act, he shall give the right of first refusal to those having a preference right under section 2 of the 1968 Act * * *. The Secretary shall offer such lands to such preference right holders at their fair market value (exclusive of any values added to the land by such holders and their predecessors in interest) as determined by the Secretary as of September 26, 1973.

Appellant herein asserted a preference right to purchase the tract in question. The governing regulation, 43 CFR 2711.4(b)(2), states:

> (2) Each preference-right applicant must, within the time specified by the authorized officer, or such extensions of time as he may grant; submit proof of ownership of the whole title to the contiguous lands, that is, he must show that he had the whole title in fee on the last day of the 30-day period. The authorized officer will specify that date. Such proof must consist of (i) *a certificate of the local recorder of deeds, or (ii) an abstract of title or a certificate of title* prepared and certified by a title company or by an abstracting company, or by a duly qualified attorney authorized to practice in the State stating on the basis of an examination of title records that the applicant owned adjoining land in fee simple on the last day of the 30-day period. If the preference-right applicant does not own adjoining land at the close of the preference-right period, his preference-right claim will be lost. After a case has been closed, the data filed pursuant to this section may be returned by the authorized officer. [Italics added.]

The decision appealed from rejected appellant's application as follows:

> Proof of ownership filed by J. Burton Tuttle established the fact that he owns equitable title to contiguous lands, however he is not the landowner of record of any lands contiguous to the parcel of public land being offered for sale. * * *
>
> The acceptance of offer of sale submitted by J. Burton Tuttle must therefore be and is hereby rejected because he does not qualify as a preference right holder as defined by * * * 43 CFR 2711.4.

The decision does not elaborate how appellant's asserted preference

right status failed to conform with the regulation. The record, however, contains a land sale contract, dated Dec. 11, 1974, by which James A. and Mary Helen Chapman agreed to sell to appellant herein certain lands including those upon which appellant bases his preference right status. The agreement incorporates a general warranty deed and lists a total purchase price of $645,325, part of which was payable in five annual installments beginning on Dec. 11, 1975. In the event of breach of the buyer, the agreement accorded the seller the right to retain all money theretofore paid, and the right to reenter the lands, dispossessing the buyer.

On May 2, 1979, BLM published a notice requiring adjoining owners "claiming any right, title, or interest in * * * [the land in issue to] notify * * * [BLM] within forty-five (45) days, from the date of this notice."

On May 11, 1979, appellant filed with BLM an acceptance of offer of sale, including a statement by a duly qualified attorney authorized to practice in the state that he was the owner in fee simple of lands contiguous to the parcel being offered for sale. *See* 43 CFR 2711.4(b). On May 25, 1979, the city of Rawlins, Wyoming, also filed an acceptance asserting ownership of contiguous lands.[1] On July 9 BLM requested the county clerk of Carbon County, to verify that appellant owned contiguous lands. The county clerk's response filed on July 26 reads: "Our last title of record shows that the above described land is listed in the name of James and Helen Chapman." BLM then telephoned appellant and was made aware of his contract to purchase lands from the Chapmans.

It is for these reasons that BLM rejected the appellant's acceptance of the offer to sell.

In his statement of reasons appellant asserts that the term "whole title" in the regulation was meant to exclude lessees, remainderman, or life tenants from the status of preference right holders. Appellant also cites authorities for his position that the term "fee simple" has never been used to distinguish between legal and equitable estates, that equitable estates, are to all intents and purposes, legal estates.

[1] In *Robert A. Davidson*, 13 IBLA 368, 370 (1973), the appellant similarly claimed preference right status by virtue of a land sale contract on which only a small fraction of the purchase price remained to be paid. The county clerk and recorder there certified to BLM that the seller of the contiguous lands in question was the sole owner in fee simple. Addressing 43 CFR 2711.4 (b) (2) the Board stated:

> The regulation was worded as set forth above so that the personnel in the State Office will not be required to construe and rule upon claims of title and contracts of sale. It is clear that the certificate of the local recorder of deeds, nam-

[1] The documents filed by the city of Rawlins on May 25, 1979, described the land in issue as "contiguous" land owned by the city. On June 19, 1979, BLM asked the city to properly execute its proof of preference right and file it by June 25, 1979. The city did so on June 26, 1979.

ing * * * [the seller] as the owner of the contiguous land in issue, is insufficient.

In *Dudley S. Long*, 16 IBLA 18 (1974), purchasers under a land sale contract asserted a preference right with the permission of the vendors of the contiguous lands. The Board held that the purchasers' status was inadequate to establish such preference right.

At first blush, *Davidson* seems to be dispositive of this case. However, our further study of the basic issue delineated here impels us to a contrary conclusion.

In *Carter Blatchford*, 53 I.D. 613 (1932), the Department held that a purchaser in possession under a contract to purchase is an owner within the contemplation of sec. 3 of the Act of Feb. 27, 1925 (43 Stat. 1013), relating to the division of erroneously meandered lands in Wisconsin among the owners of adjoining and surrounding tracts, stating:

A purchaser in possession by a contract to sell has the equitable title, the vendor having the mere right to retain the legal title as security for any unpaid balance of the agreed purchase price. *See Williams* v. *United States* (138 U.S. 514, 516); *Boone* v. *Chiles* (10 Pet. 177, 224). [53 I.D. at 614.]

In *Roberts* v. *Osburn*, 2 Kan. 90, 589 P.2d 985, 991 (1979), the court stated as follows:

"The intention of the parties is the factor in any proper decision. Parties do not frequently make express provisions as to risk, but they do indicate whether they intend a present transfer of the rights of ownership or a future transfer, and there should be no doubt that they expect all the incidents of ownership to pass from the seller to the buyer at that time. That time will frequently not be when the legal title is transferred. If, as frequently happens, a purchaser is given immediate possession under his contract, with the right to use the property as his own to the same extent as is customary with a mortgagor, the title is retained merely as security for payment of the price. It is a short way and in many states a common way of accomplishing the same end that would be achieved by conveying to the purchaser and taking back a mortgage. *When by the contract the beneficial incidents of ownership are to pass is the time which the parties must regard as the moment of transfer. This is the time when the purchaser is held to become the 'owner,'* under alienation clauses in insurance policies, and no little authority supports the conclusion that then, and not before, the risk passes to the vendee." *Torluemke*, 174 Kan. at 671, 258 P.2d at 284. [Italics supplied.] [Citing Williston on Contracts.]

There are several cases from other jurisdictions that distinguish between equitable and legal ownership. In *County of Los Angeles* v. *Butcher*, 155 Cal.App.2d 744, 318 P.2d 838 (1957), it was said:

"From the foregoing authorities it is clear that where parties enter into a written contract for the purchase and sale of real property pursuant to which the buyer goes into possession and the seller retains the legal title as security for the purchase price, the latter 'has no greater rights than he would possess if he had conveyed the land and taken back a mortgage' and the purchaser 'is for all purposes the owner.' [Citations omitted.]" p. 747, 318 P.2d p. 840.

In *Hartman* v. *Hartman*, 11 Ill.App.3d 524, 297 N.E.2d 199 (1973), the same principle was announced and followed when the court said:

"Under the doctrine of equitable conversion upon the execution of a valid, enforceable contract for the sale of realty,

the purchaser becomes the equitable owner of the realty holding the purchase money as trustee for the seller. The seller becomes trustee of the legal title for the purchaser with a lien on the land as security for the purchase money." pp. 527–528, 297 N.E.2d p. 202.

A few of the cases from other jurisdictions where this concept has been applied include: *Davis* v. *Rio Rancho Estates, Inc.*, 401 F.Supp. 1045 (S.D.N.Y. 1975); *United States* v. *Giwosky*, 349 F.Supp. 1200 (E.D. Wis. 1972); *Shreeve* v. *Greer*, 65 Ariz. 35, 173 P.2d 641 (1946); *Trickey* v. *Zumwalt*, 83 N.M. 278, 491 P.2d 166 (1971); *Reynolds Aluminum* v. *Multnomah Co.*, 206 Or. 602, 287 P.2d 921 (1955); *Jakober* v. *Loew's Theatre, Etc.*, 107 R.I. 104, 265 A.2d 429 (1970); *Committee* v. *Val Vue Sewer Dist.*, 14 Wash. App. 838, 545 P.2d 42 (1976). The United States Supreme Court has applied the same principle in holding that realty sold on contract by the United States to private individuals or corporations is subject to state and local taxation: *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851 (1946); *New Brunswick* v. *United States*, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693 (1928). See also 91 *C.J.S.*, Vendor & Purchaser § 106.

The Department stated in *Howard M. Wilson*, 63 I.D. 36, 38–39 (1956):

> In common usage, "whole title" or "title in fee" contemplates ownership in fee simple, that is, ownership of an estate of inheritance as distinguished from an estate for life or for years. Such an estate excludes all restrictions or qualifications as to the persons who may inherit as heirs.

In *Wilson* the Department ruled that the Navajo Tribe held "whole title in fee" within the meaning of the regulation, since it was the beneficial owner of the surface interests in the land, although the United States held naked legal title to the land, and although the minerals were held by another, being reserved to the grantor under a deed to the United States in trust for the tribe.

Wilson establishes that this Department will look to the true beneficial ownership to determine the party entitled to a preference right under the Act and the regulations, even though the legal title resides in another. Similarly, in *Brent L. Sellick*, A–30007 (Oct. 5, 1964), a preference claim was honored although the preference claimant had transferred the legal title under a land sale contract. The Department recognized there was no transfer of the right of possession and that the legal title was conveyed by the contract merely as a security interest. Although we do not have all the details of the transaction, the holder of the equitable, beneficial interest in the land was deemed to have the "whole title in fee," even though the legal title had been conveyed as a security interest. These cases recognize that the term "whole title in fee" should not be interpreted as limiting the preference right to a person who holds the beneficial title to an estate but has passed the legal title for security.

While there are some differences between rights and obligations under a land sale contract giving the right of possession and other indicia of ownership and those where a purchaser receives a deed and conveys a mortgage, there is no reason under the governing statute for differentiating between the two situations. In the first case the pur-

chaser receives equitable title, while in the second he receives legal title. But in both uses he is regarded as the real or beneficial owner. In both cases conditions of nonpayment to the holder of the security interest might defeat the purchaser's rights after appropriate actions by the holder of the security interest.

Dudley S. Long, *supra*, is distinguishable. The contract purchasers of contiguous land (the Emerys) timely asserted a preference right to purchase in their own behalf and tendered an amount of money to meet the high bid. Later they directed BLM to transfer the deposited tender to Dudley S. Long and Veva Long. This letter stated that "[i]t was the purpose and intent to make the bid in their [the Long's] names so they would have the property." There was also included a certificate of ownership, certified by a title company, showing that on Oct. 18, 1973, the Longs were the sole owners in fee simple of the lands contiguous to the tract in issue.

In essence, the Oregon State Office ruled in the decision below that because the owners of fee title to the surrounding private lands, the Longs, did not personally offer to purchase the tract within 30 days of the auction, the preference right provided by 43 CFR 2711.4(b)(2) was lost. The decision below pointed out that though the Emery Livestock Co. and the Emerys directed the transfer of the deposit from their account to that of the Longs, the statement indicating an agency relationship existed between them had not been corroborated by the Longs at that time. *Long* was decided on the basis that we will not sanction an "after the fact" ratification to the prejudice of the Government or of third parties, *e.g.*, the high bidder. *Long*, *supra* at 22.

We are impelled to the conclusion that a person who has contracted to purchase land, has made partial payment therefor, and is in possession thereof pursuant to the contract is the "owner" thereof, within the ambit of 43 CFR 2711.4(b)(2). *Davidson* is overruled to the extent it is inconsistent with this decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded for appropriate action consistent herewith.

FREDERICK FISHMAN
Administrative Judge

WE CONCUR:

ANNE POINDEXTER LEWIS
Administrative Judge

JAMES L. BURSKI
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

I agree that the Board's decision in *Robert A. Davidson*, 13 IBLA 368 (1973), should be overruled. I would also overrule to the extent it is inconsistent, *Dudley S. Long*, 16 IBLA 18 (1974). Although the

Long case rested upon an agency ground, to the extent it implies that the equitable owner of land under a land sale contract could not assert the preference right as the owner of the "whole title in fee," it should also be overturned. *Davidson* and *Long* were decided under the provisions of the regulations implementing the Public Sales Act, *as amended*, 43 U.S.C. § 1171 (1970). That Act has been repealed by sec. 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2790. However, the regulations pertaining to the Public Sales Act were followed in determining rights under the Unintentional Trespass Act of Sept. 26, 1968, 82 Stat. 870, *as amended* by sec. 214 of FLPMA, 43 U.S.C. § 1722 (1976).

The basic question under both statutes on who may have a preference (or right of first refusal under the amended Unintentional Trespass Act) is who is an "owner" of land contiguous to the land to be sold. Regulation 43 CFR 2711.4(b) under the Public Sales Act made applicable to the sales under the Unintentional Trespass Act (by 43 CFR 2785 (1971) requires a preference-right applicant to submit proof of "ownership of the whole title to the contiguous lands." Proof includes a certificate of the local recorder of deeds, an abstract of title or a certificate of title prepared and certified by a title company or by an abstracting company, or by a duly qualified attorney authorized to practice in the state stating "on the basis of an examination of title records that the applicant owned adjoining land in fee simple on the last day of the 30-day period." A statement was timely filed by appellant's attorney in this case that appellant was owner of contiguous lands in fee simple, however, it did not include a statement that this was based upon an examination of the records. Thereafter, supplemental information was submitted showing the contract of sale, warranty deed, and additional documents. For the reasons I expressed in my dissent in *Robert A, Davidson*, *supra* at 372, such clarifying proof should be accepted and the preference right acknowledged.

Because the term "owner of the whole title in fee" applicable in the Public Sales Act regulations is followed for the Unintentional Trespass Act cases, the meaning should be the same. I agree that the vendee and equitable interest holder of the fee simple title comes within the meaning of the regulations and is qualified as the owner of contiguous lands to be entitled to the right of first refusal under the Unintentional Trespass Act. My views of the proper interpretation to be given to the regulations under the Public Sales Act, which are to be applied here, were set forth in the dissent in *Robert A. Davidson*, *supra*. For both the procedural and substantive reasons expressed in my dissent in *Davidson* showing the history of the regulations and of pertinent Departmental decisions, I agree with the result reached in Judge Fish-

man's opinion and disagree with Judge Stuebing's opinion. Some of the substantive reasons I discussed in *Davidson* are reiterated in Judge Fishman's opinion. Additional reasons are given in my dissent in *Davidson* and will not be repeated here. I adhere to those views.

JOAN B. THOMPSON
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

Regrettably, it will be necessary to reiterate the salient regulation in order to illustrate my difference with the majority. 43 CFR 2711.4 (b) (2) provides:

> (2) Each preference-right applicant must, within the time specified by the authorized officer, or such extensions of time as he may grant, *submit proof of ownership of the whole title to the contiguous lands, that is, he must show that he had the whole title in fee on the last day of the 30-day period.* The authorized officer will specify that date. Such proof must consist of (i) a certificate of the local recorder of deeds, or (ii) an abstract of title or a certificate of title prepared and certified by a title company or by an abstracting company, or by a duly qualified attorney authorized to practice in the State *stating on the basis of an examination of title records that the applicant owned adjoining land in fee simple on the last day of the 30-day period.* If the preference-right applicant does not own adjoining land at the close of the preference-right period, his preference-right claim will be lost. After a case has been closed, the data filed pursuant to this section may be returned by the authorized officer. [Italics added.]

In order to qualify for a preference right, then, the applicant must prove that he was the owner of the whole title in fee simple on the last day of the 30-day period by submitting either the certificate of the local recorder, a certificate or an abstract of title by a title insurance or abstract company, or an attorney's opinion, all or any of which *must be based upon an examination of the title records.*

The first point I wish to make is that whatever interest appellant may have had in the contiguous land at that time *was not reflected by the title records.* As noted in Judge Fishman's opinion, the county clerk of Carbon County advised BLM that, "Our last title of record * * * is listed in the name of James and Helen Chapman." Thus, it was manifestly impossible for appellant to provide the proof required by the regulation to support his claim to a preference right.

Judge Fishman's opinion states, "The record, however, contains a land sales contract, dated December 11, 1974, by which James A. and Mary Helen Chapman agreed to sell to appellant certain lands including those upon which appellant bases his preference right status." I hasten to point out that Judge Fishman's allusion to "the record" refers to the administrative record before this Board on appeal, not to the land title records of Carbon County, Wyoming. Since the opinion of the attorney which was tendered by appellant in purported compliance with 43 CFR 2711.4(b)

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(2) was *not* made "on the basis of an examination of title records," as that regulation requires, BLM properly refused to recognize it. This is reason enough to affirm BLM's decision.

In *Jess R. Manuel*, A–27482 (Nov. 29, 1957), the Department encountered a form of proof which did not conform to the requirements of the regulation. In disallowing it, and the conforming proof which was later filed, the Department said:

> *The regulation plainly requires in mandatory terms* that proof of ownership be shown in one of two ways. The appellant does not contend that he qualified under (ii) (a) (*supra*), but he urges that the certificate of the Supervising Land Title Abstractor of the State Lands Commission satisfies (ii) (b) (*supra*). However, the State Lands Commission is an agency of the State to California to which the United States conveyed the property used to substantiate Manuel's preference right claim. It is, in effect, nothing more than a statement by the owner of land as to his own title and, as such, *it cannot be accepted as the statement required by the regulation. Where the proof of ownership does not comply with the regulation, the Department has held that the preference right is lost even though the proof clearly shows the claimant to have been the owner of adjoining land,* at least prior to the sale. *William H. Boyd, Clarence Virgil West*, A–27440 (June 3, 1957); see *Fred and Mildred M. Bohen et al.*, 63 I.D. 65 (1956). *When Manuel filed a proper certificate of the local recorder of deeds* on May 14, 1956, *the 30-day period had long since elapsed and he had lost his right to assert a preference right to purchase. Id.* [Italics added.]

In *E. E. Larson*, A–27462 (Sept. 17, 1957), the proof of contiguous ownership consisted of a deed on a tax foreclosure, a warranty deed, and a copy of a contract for sale. The claim of preference was rejected because the proof did not conform to the requirements of the regulation, and the subsequent proof was not filed timely. The Department affirmed.

The second point I wish to make is that the contract executed by and between the Chapmans and the appellant cannot possibly be contrued as investing appellant with "ownership of the whole title in fee simple," even were it recorded. The contract provides, in part: "10. *Recording agreement.* This agreement shall not be placed of record but there shall be placed of record an instrument entitled 'Notice of Execution of Agreement' a copy of which is attached hereto as Schedule 'G'."

Turning to Schedule "G" (a copy—not the original), there is no showing it was ever recorded. We do find however, that the instrument declares that the Chapmans and Tuttle have executed an agreement whereby "said J. Burton Suttle [*sic*] *has the right during the term of said agreement to purchase*" (Italics added) the property thereafter described. Returning now to the basic contract instrument, we find that it provides that the Chapmans are to execute a standard statutory warranty deed conveying the property to appellant. This deed, however, is not to be delivered to appellant. Instead it is to be held in escrow by the Rawlins National Bank, and not delivered to appel-

lant until and unless the Chapmans receive the entire purchase price and interest.

In the event of a default, notice must be given and demand made for full payment within a specified time, failing which, in the words of the contract "then the Seller shall be relieved of all liability and obligations *from conveying the property* and shall retain all payments made hereunder as liquidated damages for breach of this agreement *and as rent for the use and occupation of said property* * * *." (Italics added.)

The contract further provides that the Chapmans may then notify the escrow agent and demand redelivery to them of the deed. The agent must then require Tuttle to pay the entire amount within 30 days, failing which "the escrow agent shall redeliver said deed and other escrow documents to the Seller."

From the foregoing it is clear that no conveyance of this land had taken place while the contract was still executory, as it was when appellant asserted his preference right to buy the contiguous Federal land. The instrument itself speaks of the sellers' obligations to convey in future terms. The deed from the Chapmans to Tuttle was withheld from Tuttle precisely because a deed is not effective to convey title until delivery. "An instrument delivered to a third person subject to recall before delivery to the grantee *is not effectual to pass title*." (Italics added.) 23 Am. Jur. 2d, *Deeds. Delivery to third person* § 96 (1965).

What appellant had at the critical moment is perfectly described by the legal term "inchoate" title, which means "[i]mperfect; partial; unfinished; begun but not completed" *Black's Law Dictionary*, 4th ed. p. 904. Surely, the majority errs when it equates such an interest with ownership of the whole title in fee simple.

By analogy, suppose the preference right claimant were the owner of an unpatented mining claim which was valid in every respect, but the claimant had not yet completed his required $500 worth of improvements. Would the majority consider *him* the owner of the whole title in fee simple? I rather suspect not, although once the improvement work was done he would be entitled to receive fee patent as a matter of law.

The third point I wish to make is that the majority has misconstrued the language of the regulation and, in so doing, frustrated its purpose. Such words as "ownership of the whole title," and "has the whole title in fee," and "owned adjoining land in fee simple" can hardly have been included accidentally or through ignorance. We should recognize that when the drafter of the regulation wrote the requirement that a preference right applicant must show ownership of the whole title in fee simple to the contiguous lands, that is precisely what was intended. Yet the majority presumes to hold that appel-

lant's equity in the contiguous land created by partial payment of the purchase price under the contract, coupled with his possession of the land, constitutes ownership of the whole title in fee simple, notwithstanding the fact that appellant had not paid the full purchase price, no conveyance had been made, and the holders of the legal title (the Chapmans) had the right to refuse to convey if the appellant defaulted. This is errant nonsense.

Clearly, the regulation was written to insure that the person who asserted the preference right would join the subject Federal land to the contiguous lands on which that preference was based. If the preference right applicant acquired the Federal land but lost the adjacent private land to another holder of an outstanding interest, the object and purpose of the preference right would be defeated. Therefore, to insure that the objective would be met, the regulation requires that only those who can prove ownership of the whole title in fee simple are eligible to assert a preference right.

Alaska Placer Co., 33 IBLA 187, 84 I.D. 990 (1977), is a case in point. There the corporate owner of a group of mining claims contracted to sell the claims to a husband and wife on a conditional contract of sale, with a down payment and successive installments. The buyers defaulted, the corporation declared their interest forfeited, refused to convey, and ordered the buyers to vacate. When the buyers refused, the Supreme Court of the State of Alaska held that the buyers were mere trespassers after default and enjoined their continued occupancy. We held in that case that the possession of the putative buyers was in recognition of the title held by the seller, and was in law the occupancy of the seller by those whom the seller put into possession under a conditional contract to deed.

Judge Fishman's citations of various authorities which construe the term "owner" to include an equitable owner are not germane to the issue of what is meant by "ownership of the whole title in fee," which I regard as a much more specific and restrictive qualification. The one case cited by Judge Fishman which defines "whole title in fee" as he does, is *Howard M. Wilson*, 63 I.D. 36 (1956), and that case is distinguishable on its peculiar facts. There the United States had acquired certain land in trust for the use and benefit of the Navajo Tribe of Indians. The Department held that under those circumstances, "For all practical purposes, the Tribe owns all that was conveyed by deed and * * * may be considered to be the owner of contiguous land within the meaning of the public sale law although naked legal title to the land is in the United States." Of course, in that instance it was true, as it was, and is, inconceivable that the United States could or would violate its trust responsibilities and attempt to oust the tribe and acquire the tribe's interest in the land. The tribe in that case was not exposed to the loss of its interest

through prescribed conditions and contingencies, as appellant in this case was, nor was there any further conveyance contemplated to complete the transaction, as there was in this case, nor did the tribe owe any further obligation to perform, as did the buyer in this case.

When BLM was first confronted with this situation, it sought and acted upon the advice of the Department's Regional Solicitor. The Regional Solicitor's opinion that Tuttle was not a qualified preference right applicant was based on two previous decisions of this Board, *i.e.*, *Dudley S. Long*, 16 IBLA 18 (1974), and *Robert A. Davidson*, 13 IBLA 368 (1973). Both decisions were authored by Judge Fishman, both involved the assertion of a preference right by one who was purchasing under a contract, and in each case the rejection of the applicant's claim to a preference right was affirmed by this Board. In the *Long* case, *supra*, the Longs were selling the adjacent land to the "Emery Brothers," who attempted to assert a preference right. BLM rejected on the ground that the Longs were the owners of the fee title, whereupon the Emerys attempted to show that they were acting on behalf of the Longs. The Board, applying agency law, held that we could not recognize the right of the Emerys to act for the Longs, nor could we recognize their joint assertion on appeal that together they held the whole title to the adjacent land.

In *Davidson*, *supra*, an en banc decision, the Board faced a fact situation almost identical to the instant case. Davidson, who was purchasing contiguous land from one Chamberlain under a contract to deed, asserted a preference right. He was rejected by BLM because the county clerk and recorder certified that the owner of record was Chamberlain. In affirming BLM's decision, the Board made a number of highly significant declarations, viz:

> In his statement of reasons appellant's attorney states that "appellant Davidson does have the 'title in fee', as he is in just and legal possession of the contiguous property * * *." The attorney further states that under the land sales contract there remained an unpaid balance of $8,600 of a total purchase price of $76,375. He urges that a contract for deed should be accorded the same legal impact as a "deed over-mortgage back" transaction. We proceed to consider first the question whether the documents filed by appellant on October 13, 1972, satisfied regulatory requirements.
>
> * * * Appellant's recital on the form that he holds a "contract for deed from Lawrence A. Chamberlain and Leona A. Chamberlain dated June 8, 1960" does not satisfy the regulations, since it does not fall within any of three categories spelled out in the regulation. *See Jess R. Manuel*, A-27482 (November 29, 1957); *E. E. Larsen*, A-27462 (September 17, 1057); *William H. Boyd*, A-27440 (June 3, 1957).
>
> * * * * *
>
> The preference right provisions of the Public Lands Sale Act and regulations have been strictly construed. *See Charles Kik*, A-27872 (December 1, 1959); *Lawrence V. Lindbloom*, A-27993 (August 4, 1959). *Cf. Albert P. Comer*, A-28150 (April 5, 1960). The rights of a good faith high bidder, as well as those of a con-

tiguous landowner, are involved. [Footnote omitted.]

The *Davidson* decision was well founded when written, was approved en banc by a majority of the Board, and remains the proper rule in such cases. It served as the predicate for BLM's decision in the instant case, and it should not be overruled lightly.

Finally, the majority ignores a point which was of serious concern to the Board in arriving at its holding in *Davidson*, *i.e.*, the right of the high bidder to purchase the land absent the intervention of a qualified claimant to a preference right. By "liberalizing" the interpretation of the regulation so as to equate an inchoate equitable interest with ownership of the whole title in fee simple, the Board will deprive the high bidder of what otherwise would be his/her right to purchase the land in other similar cases.

In summary then (1) the proof submitted by appellant did not meet the requirements of the regulation as it was not based upon an examination of the title record; (2) an inchoate equitable interest based upon a contract which is still executory and where no conveyance has been made to the purchaser and none is intended until some future time does not invest the purchaser with ownership of the whole title in fee simple; (3) the decision of the majority defeats the purpose of the regulation in that there is no firm assurance that the preference right purchaser will become the owner of the contiguous land which serves as the basis for the assertion of the right; and (4) it can defeat the right of a high bidder to purchase the land—a right which would continue to be enjoyed had we adhered to our own good precedent set in the *Davidson* case.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

JOSEPH W. GOSS
Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

GREEN COAL CO.

2 IBSMA 199

Decided *August 19, 1980*

Appeal by Green Coal Co. from the Jan. 4, 1980, decision of Administrative Law Judge Tom M. Allen, in Docket No. NX 9-112-R, upholding Notice of Violation No. 79-II-21-8, issued by the Office of Surface Mining Reclamation and Enforcement for an alleged violation of 30 CFR 715.19(e)(1)(vii)(A) (blasting within 1,000 feet of a dwelling without approval of the regulatory authority).

Vacated.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

Pursuant to 43 CFR 4.1161-.1162, it was error for the Administrative Law Judge not to dismiss an application for review

filed with the Hearings Division after the time prescribed for such applications.

APPEARANCES: Joseph H. McKinley, Jr., Esq., McKinley and Howard, Owensboro, Kentucky, for Green Coal Company; John Philip Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Green Coal Co. (Green) appealed from the Jan. 4, 1980, decision of the Hearings Division upholding Notice of Violation No. 79–II–21–8, issued to Green by an inspector of the Office of Surface Mining Reclamation and Enforcement (OSM) who determined that Green had violated 30 CFR 715.19(e)(1)(vii)(A) (by blasting within 1,000 feet of a dwelling without the approval of the regulatory authority) at its Crane Pond mine. We hereby vacate that decision, because there was no authority to consider Green's application for review not timely filed with the Hearings Division, and grant OSM's motion to dismiss Green's application for review.

Factual and Procedural Background

OSM issued Notice of Violation (NOV) No. 79–II–21–8 to Green on May 9, 1979, following an inspection of Green's Crane Pond mine (Permit No. 6475–77), Daviess County, Kentucky, by OSM inspector Gail Kowaleski. The inspector described a violation of 30 CFR 715.19(e)(1)(vii)(A) in the NOV as follows: "Blasting within 1000′ of dwelling without approval of regulatory authority: specifically, blasting approximately 800′ from Charlesetta Simmons dwelling." On May 14, 1979, OSM modified the remedial action ordered in the NOV to make clear that Green was obligated to obtain a waiver from the regulatory authority for blasting within 1,000 feet of the Simmons' dwelling before continuing with such blasting activity.[1]

By a letter dated May 15, 1979, Green supplied OSM's Assessment Office with information pertaining to NOV 79–II–21–8, "[a]s allowed by section 723.16."[2] OSM acknowledged the letter. Subsequently, by a letter dated June 8, 1979, Green requested a conference with Assessment Office personnel to review the civil penalty assessment proposed on the basis of the NOV. OSM's written response to the request,

[1] Because of our holding, it is not necessary for us to describe or evaluate the findings which were the basis for the issuance of the NOV.

[2] 30 CFR 723.16(a) provides:

"Within 10 days of service of a notice or order, the permittee may submit information in writing pertaining to the violation involved to the Assessment Office and to the inspector who issued the notice or order. The Office shall consider any information so submitted in determining the facts surrounding the violation and the amount of the penalty."

Included in Green's letter was the request that the NOV be dismissed.

dated Aug. 8, 1979, was that a conference was not necessary because the point value assigned to the violation was less than 30 and, therefore, OSM would not require Green to pay a civil penalty.[3]

On Aug. 27, 1979, Green filed with the Hearings Division an application for review of NOV 79–II–21–8. The application consisted of a copy of Green's May 15 letter to the Assessment Office and a covering letter which contained an explanation for the timing of the filing:

> On May 15th, the enclosed letter was mistakenly sent to the Assessment Office, rather than to the Hearings Division. It was my understanding from conversations with the field inspector that the Assessment Office first determined if there was a violation, and set the assessment before any hearings could take place.

On Sept. 17, 1979, OSM moved to have Green's application dismissed. The motion was denied on Jan. 23, 1979, by a ruling that, in response to Green's May 15 letter (particularly the request that the NOV issued to Green be dismissed), "OSM should have either notified the applicant that the Assessment Office was the wrong place to request a dismissal of a notice of violation or else forwarded the correspondence to the Office of Hearings and Appeals," and that "any branch of the U.S. Department of the Interior is now estopped from enforcing the provisions of 43 CFR 4.1161." OSM's request that the ruling be certified to this Board for review, pursuant to 43 CFR 4.1124, also was denied.

A hearing to review the NOV was held on Nov. 29, 1979; a decision upholding OSM's enforcement action was issued on Jan. 4, 1980. Green filed a timely appeal from that decision. Both parties filed briefs.[4]

Discussion

In its brief, OSM argues that the Board should not address the merits of the NOV issued to Green because the company failed to seek timely review thereof before the Hearings Division. OSM suggests that the Board vacate the decision below on the ground that the Administrative Law Judge lacked authority to consider Green's untimely filed application for review, particularly in the face of OSM's objection thereto.[5] For the reasons set forth below, we agree that there was no authority to review the enforcement action against Green. Accordingly, our decision is to vacate the result reached in the proceedings before the Hearings Division, and to reverse the dismissal of OSM's motion against

[3] Discretionary authority not to assess a civil penalty, when the points assigned on the basis of a notice of violation are less than 30, is implied in 30 CFR 723.12.

[4] On June 3, 1980, the Board ordered supplemental briefing on whether the decision of the Court of Appeals partially invalidating 30 CFR 715.19(e)(1)(vii)(A), *In re Surface Mining Litigation*, Nos. 78–2190, 78–2191, and 78–2192 (D.C. Cir. May 2, 1980), should be accorded retrospective effect in our deliberations (assuming we were to reach the merits of the NOV issued to Green).

[5] OSM's motion to dismiss Green's application was filed prior to any formal action to consider the application within the Hearings Division. The Board accepts that this motion was timely filed, as required by 43 CFR 4.1112.

consideration of Green's application for review.

[1] Secs. 4.1161 through 4.1162 of the procedural regulations provide, in pertinent parts, that "[a] permittee issued a notice or order by the Secretary * * * may file an application for review with the Hearings Division," and that "[a]ny person filing an application for review * * * *shall file* that application within 30 days of the receipt of a notice or order or within 30 days of receipt of notice of modification, vacation, or termination of such a notice or order." [6] (Italics added.) Whether or not, under other circumstances, these regulations might be construed to permit a filing beyond the stated period, there is nothing in the facts now before us that would lead to that conclusion.

Green was apprised of the proper procedures for seeking review of a notice of violation both through the constructive notice afforded by 43 CFR 4.1160–.1171 and by the actual notice afforded by service of Notice of Violation No. 79–II–21–8, which included explicit information concerning the filing of an application for review.[7] Instead of following the procedures set forth in these materials, Green submitted its request for dismissal of the NOV to the Assessment Office. The company did so, it claims, as the result of representations by the inspector who issued the NOV. The actual content of any such representations was not offered into evidence; therefore, we have before us only Green's assertion that they occurred and were misleading. That is not enough to establish responsibility on the part of OSM for the lateness of Green's filing.

The fact that the Assessment Office did not take affirmative action to promote the filing of an application for review by Green with the Hearings Division does not affect our conclusions above. The correspondence of May 15, 1979, which the Administrative Law Judge determined to be a misdirected application for review, was expressly undertaken by Green pursuant to 30 CFR 723.16. Personnel in the Assessment Office, upon reading the letter, could conclude reasonably that it was intended to present information to be considered in proposing a civil penalty assessment—despite the request therein that the NOV be dismissed. We therefore

[6] In the Department's regulations there is no explicit authorization of or prohibition against consideration of applications for review not timely filed with the Hearings Division. 43 CFR 4.22(f), a general rule pertaining to practice before the Department, authorizes extensions of time for the filing or serving of a document only in a *pending proceeding* and only when a request for an extension is submitted *within the time* allowed for the filing. Inasmuch as review of a notice of violation is *initiated* by an application for review, extensions of time for the filing of such applications are not governed by this rule (unless by negative implication, which we are not prepared to hold at this time).

[7] On the first page of the NOV are the words "IMPORTANT—PLEASE READ CAREFULLY" followed by the instruction:

"1. Review. You may apply for review of this Notice by submitting an application for review, within 30 days of receipt of this Notice by you or your agent, to: Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22202"

cannot agree with the Administrative Law Judge that this correspondence gave rise to any obligation on the part of OSM to notify Green to file an application for review with the Hearings Division.

For the foregoing reasons, the decision below is vacated,[8] and the motion to dismiss the application for review of Green Coal Company is granted.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

APPEAL OF STATE OF ALASKA

5 ANCAB 4

Decided *August 20, 1980*

Appeal from the Decision of the Bureau of Land Management A–050903, AA–6701–D, 43 FR 14542 (Apr. 6, 1978).

Reversed in part.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Decisions

The Board is bound by statements of policy made by the Secretary of the Interior and contained in a published Departmental Manual Release or in a Secretarial Order published in the *Federal Register*.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third–Party Interests

Where lands tentatively approved for conveyance under the Alaska Statehood Act were leased by the State of Alaska pursuant to its open-to-entry lease program prior to enactment of the Alaska Native Claims Settlement Act, such lands must, pursuant to Secretary's Order No. 3029 (43 FR 55287 (1978)), be excluded from conveyance under the Alaska Native Claims Settlement Act because the leases and concurrent purchase options are valid existing rights leading to the acquisition of title.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third–Party Interests

The policy expressed in Secretary's Order No. 3029 (43 FR 55287 (1978)), is applicable to all lands still within the Department's jurisdiction, even if the decision to convery such lands pursuant to the Alaska Native Claims Settlement Act was issued by the Bureau of Land Management prior to publication of Order No. 3029.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third–Party Interests

Where tentative approval of land selections by the State of Alaska under the Statehood Act was rescinded by the Bureau of Land Management to permit conveyance of the same lands to a Native corporation under the Alaska Native Claims Settlement Act, and subsequently Secretary's Order No. 3029 found that third-party interests leading to fee title, created by the State of Alaska in such lands, were valid existing rights which much be excluded from conveyance to the Native corporation, the Bureau of Land Management must reinstate tentative approval of the State of Alaska's selection of such lands so that the State of Alaska

[8] Although we do not reach the merits in this case, we note that, as a result of the decision of the Court of Appeals for the District of Columbia Circuit, n.4, *supra*, the Office of Hearings and Appeals will not recognize Notice of Violation No. 79–II–21–8 as part of a pattern of violations, pursuant to 30 CFR 722.16, or as part of a history of previous violations, pursuant to 30 CFR 723.12.

is able to grant title to such third parties as contemplated by Order No. 3029.

APPEARANCES: James N. Reeves, Esq., and Shelley J. Higgins, Esq., on behalf of the State of Alaska; A. Robert Hahn, Esq., Hahn, Jewell, Stanfill & Frost, on behalf of Seldovia Native Association; James D. Linxwiler, Esq., on behalf of Cook Inlet Region, Inc.; and M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This appeal involves the question of whether open-to-entry leases issued by the State of Alaska prior to enactment of the Alaska Native Claims Settlement Act (ANCSA) on lands tentatively approved to the State of Alaska but subsequently withdrawn by § 11(a)(2) of ANCSA for possible Native selection are protected under ANCSA. The Board finds the question is answered in the affirmative by Secretary's Order No. 3029 (43 FR 55287, Nov. 27, 1978); that the Board is bound by published Secretarial Orders; and that Order No. 3029 is applicable to all lands still within the Department's jurisdiction. The Board concludes that the land underlying the open-to-entry leases here appealed must be excluded from conveyance to the Native corporation, and that the Bureau of Land Management must reinstate tentative approval of the State of Alaska's selection of such land so that the State of Alaska is able to grant title to the lessees as contemplated by Order No. 3029.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Decision reversing in part the above-designated decision of the Bureau of Land Management.

PROCEDURAL BACKGROUND

On Dec. 29, 1959, the State of Alaska (State) filed a selection application for lands near the Native Village of Seldovia. On Oct. 4, 1960, Aug. 5, 1964, and Nov. 15, 1966, the Bureau of Land Management (BLM) issued decisions to tentatively approve conveyance to the State of certain lands within T. 7 S., R. 12 W., Seward meridian. Prior to Dec. 18, 1971, the State issued numerous open-to-entry (OTE) leases for tracts within the tentatively approved lands. On Dec. 18, 1971, § 11 of ANCSA withdrew for Native selection the lands surrounding the Village of Seldovia, including lands in the preced-

ing State selection. On May 16, 1974, Seldovia Native Association, Inc. (Seldovia) filed village selection application AA–6701–D for lands located near the village, including lands within the prior State selections.

In two separate decisions, the BLM on Oct. 6, 1975, vacated the tentative approval previously given for conveyance of the subject lands to the State and on Oct. 9, 1975, approved conveyance of the lands to Seldovia, subject to valid existing rights therein. Seldovia had excluded the State OTE leases from its selection application, but the BLM, in its October 9 decision, identified and considered selected all the OTE leases excluded by Seldovia. The October 9 decision further specified that the lands approved for conveyance to Seldovia were unoccupied and did not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title.

The State appealed the Oct. 6, 1975, decision of the BLM vacating the tentative approval previously given for conveyance of the lands to the State and rejecting the State's selection application as to such lands. The State appeal was consolidated with the *Appeal of Seldovia Native Association, Inc.*, ANCAB VLS 75–15. Seldovia had argued as the basis for its appeal, *inter alia*, that the Oct. 9, 1975, Decision to Issue Conveyance (DIC) proposed the reservation of OTE leases without specifying the extent of the lessees' rights, and that the decision should be amended to specify that the only interest of the OTE lessees which survived ANCSA as a valid existing right is the enjoyment of the present lease term.

In deciding *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75–14/75–15], the Board held that, pursuant to ANCSA, land previously tentatively approved for conveyance to the State was to be conveyed to Native corporations subject to OTE leases issued by the State, but that at the end of the lease term the lessee's rights would end, and the lessee could not enforce the option provided by Alaska statute to receive patent to the land because title to the land would have passed to the Native corporation upon conveyance and the State would never obtain title to convey to the lessee.

In response to, and as a partial reversal of, the position taken by the Board in *Appeals of State of Alaska and Seldovia Native Association, Inc., supra*, the Secretary of the Interior issued Order No. 3016, 85 I.D. 1 (Dec. 14, 1977). Therein, the Secretary determined that State OTE leases issued prior to the effective date of ANCSA on lands tentatively approved to the State, together with the lessee's statutory option to purchase the lands, were valid existing rights protected pursuant to § 14(g) of ANCSA. The Secretary declared that conveyances to Native corporations should

be issued subject to such OTE leases, and that the purchase option could subsequently be exercised by the lessee against the grantee Native corporation. Nonetheless, the Secretary declared that the Order was not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official.

On Apr. 5, 1978, the BLM reissued as a single decision its decisions of Oct. 6 and Oct. 9, 1975. A portion of the lands which had been State selected and tentatively approved were found to have been properly selected under village selection application AA–6701–D. Accordingly, the tentative approval previously given for conveyance of lands to the State was rescinded in part, and the underlying State selection application rejected in part.

In its DIC, the BLM found that the subject lands

> do not include any lawful entry perfected under or being maintained in compliance with Federal laws leading to acquisition of title.
>
> In view of the foregoing, the surface estate of the following described lands * * * is considered proper for acquisition by Seldovia Native Association, Inc., and is hereby approved for conveyance pursuant to section 14(a) of the act [Alaska Native Claims Settlement Act].

Continuing, the BLM provided:

> The grant of lands shall be subject to:
>
> * * * * * *
>
> 5. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by section 14(g) of ANCSA, all of which are located in. T. 7 S., R. 12 W., Seward Meridian:
>
> a. Open-to-entry leases
>
> 1. ADL 29454 located in lot 4 of U.S. Survey 3973.
> 2. ADL 41005 located in SE¼ SE¼ of section 1 and NE¼ NE¼ of section 12.
> 3. ADL 41084 located in NW¼ SW¼ of section 29.
> 4. ADL 41085 located in NW¼ SW¼ of section 29.
> 5. ADL 41425 located in NE¼ NE¼ of section 12.
> 6. ADL 41704 located in SW¼ SW¼ of section 30.
> 7. ADL 42954 located in SW¼ SE¼ of section 1.
> 8. ADL 44546 located in SE¼ SE¼ of section 1 and NE¼ NE¼ of section 12.
> 9. ADL 45373 located in NE¼ NE¼ of section 12.
> 10. ADL 47164 located in SW¼ SE¼ of section 1.
> 11. ADL 51665 located in SE¼ SW¼ of section 1.
> 12. ADL 55132 located in SW¼ SW¼ of section 1.
> 13. ADL 55138 located in S½ SW¼ of section 1.
> 14. ADL 55210 located in NE¼ NE¼ of section 12.
>
> * * * * * *
>
> Secretarial Order 3016 of December 14, 1977, establishes the policy of the Department of the Interior to valid existing rights under ANCSA. However, the order is not retroactive in that it does not affect the final decision previously rendered by the Alaska Native Claims Appeal Board, VLS 75–14 and 15.

On May 8, 1978, following notice that the Secretary had decided to reconsider Secretary's Order No. 3016, *supra*, the State filed its Notice of Appeal from the above-referenced Apr. 5, 1978 decision of the BLM. The State alleged as the

basis for its appeal, *inter alia*, that (1) the lands subject to open-to-entry leases should have been excluded from those lands approved for conveyance to Seldovia pursuant to ANCSA, (2) the land covered by the State OTE lease ADL 41704 was purchased by the lessee prior to the Bureau's decision, so regardless of the Board's disposition of OTE leases generally, the land embraced by ADL 41704 should have been excluded from the lands approved for conveyance, and (3) OTE lease ADL 29454 expired prior to the Bureau's decision without any effort on the part of the lessee to extend, renew, or convert the lease, so the land embraced thereby was on the date of the Bureau's decision available for conveyance without encumbrance to Seldovia.

On Nov. 20, 1978, the Secretary of the Interior issued Order No. 3029, 43 FR 55287 (1978). Order No. 3029, *supra*, reaffirmed the Secretary's position in Order No. 3016, *supra*, that rights created pursuant to the State's OTE lease program are valid existing rights within the meaning of ANCSA. Revising his earlier position, though, that conveyances of land under ANCSA should be issued subject to previously-issued OTE leases, the Secretary declared that land covered by such leases should be excluded from conveyances to Native corporations. Also, the Secretary referred to the Solicitor the question of whether the Order should be applied retroactively to decisions of this Board and of the BLM issued prior to publication of Order No. 3029, *supra*. On Jan. 31, 1979, pending the issuance of a ruling on the question of retroactivity, the Board suspended further proceedings in this appeal.

On Jan. 18, 1980, pursuant to a Stipulation for Partial Dismissal, the Board ordered this appeal dismissed insofar as it involved interests claimed pursuant to OTE lease ADL 29454, because that lease had expired and was not extant on the date of the DIC from which this appeal was taken. Such dismissal accords with Order No. 3029, *supra*, wherein the Secretary declared, "If the lessee fails to exercise the option to purchase, the affected Native corporation can * * * have the land conveyed as part of its original entitlement."

The issue of retroactivity was decided Mar. 27, 1980. By publication of Departmental Manual Release Number 2246, 601 DM 2, the Secretary decided that the policy set forth in Order No. 3029, *supra*, would be applied retroactively. The Secretary also expressly reversed the decision of this Board in *Appeals of State of Alaska and Seldovia Native Association Inc.*, *supra*. The Secretary adopted the memorandum of the Solicitor dated June 2, 1979 (attached as Appendix 3 to 601 DM 2) as the position of the Department and decided that the policy stated in Order No. 3029, *supra*, would apply to all land still within the Department's jurisdiction.

The Board, on May 9, 1980, ordered the record of the appeal

closed as of June 9, 1980, but allowed the filing of additional briefing prior to closing of the record. Seldovia and the State each filed an additional brief pursuant to the Board's order.

DECISION

[1] The Board has previously held that it is bound by statements of Secretarial policy contained in a Secretarial Order published in the *Federal Register*. *Appeal of Ouzinkie Native Corp.*, 4 ANCAB 3, 86 I.D. 618 (1979) [VLS 78-7]. The Board is also bound by statements of policy made by the Secretary and contained in a published Departmental Manual Release.

[2] Thus, the Board is bound by the Secretarial policy expressed in Order No. 3029, *supra*, and in Departmental Manual Release Number 2246, *supra*, which policy is dispositive of this appeal. Specifically, where lands tentatively approved for conveyance under the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. Prec. § 21 (1958), were leased by the State pursuant to its OTE lease program prior to enactment of ANCSA, such lands must, pursuant to Order No. 3029, *supra*, be excluded from conveyance under ANCSA because the leases and concurrent purchase options are valid existing rights leading to the acquisition of title. Further, the OTE lessees are not precluded by the ANCSA conveyance from receiving patent for the leased land from the State.

[3] This policy is applicable to all lands still within the Department's jurisdiction, even if the decision to convey such lands under ANCSA was issued prior to publication of Order No. 3029, *supra*.

[4] Tentative approval of land selections by the State under the Statehood Act, *supra*, was rescinded by BLM to permit conveyance of the same lands to Seldovia under the Alaska Native Claims Settlement Act. Subsequently, Order No. 3029, *supra*, found that third-party interests leading to fee title, created by the State in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation. Accordingly, BLM must reinstate tentative approval of the State's selection of such lands so that the State is able to grant title to such third parties as contemplated by Order No. 3029, *supra*.

The State argued that regardless of the Board's disposition of OTE leases generally, the land embraced by OTE lease ADL 41704 should have been excluded from the lands approved for conveyance, because prior to the date of the DIC the State had patented the leased land to the lessee. The State's argument is not persuasive.

The State failed to state whether the patent had been issued prior to the effective date of ANCSA. A patent issued after the effective date of ANCSA does not, in and of itself, establish valid existing rights protected under ANCSA. Creation of new third-party interests by the

issuance of State patent after ANCSA would violate § 11(a)(2) of ANCSA, and any such interest created after ANCSA would not be protected under ANCSA.

Nevertheless, the land embraced by OTE lease ADL 41704 and subsequently patented by the State is to be protected under ANCSA. Because the lease and concurrent purchase option comprise an interest leading to acquisition of title, pursuant to Order No. 3029, *supra*, the land is to be excluded from conveyance under ANCSA.

ORDER

It is therefore Ordered that the decision of the Bureau of Land Management here appealed is reversed to the following limited extent:

(a) The BLM's rejection of State of Alaska selection application A–050903 is reversed insofar as the rejection applies to lands covered by OTE leases ADL 41005, ADL 41084, ADL 41085, ADL 41425, ADL 41704, ADL 42954, ADL 44546, ADL 45373, ADL 47164, ADL 51665, ADL 55132, ADL 55138, and ADL 55210 issued by the State of Alaska.

(b) Lands covered by OTE leases ADL 41005, ADL 41084, ADL 41085, ADL 41425, ADL 41704, ADL 42954, ADL 44546, ADL 45373, ADL 47164, ADL 51665, ADL 55132, ADL 55138, and ALD 55210 shall be excluded from those lands to be conveyed to Seldovia Native Association, Inc.

All pending motions of the parties before the Board in this appeal not specifically addressed herein are defined.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEAL OF DANIEL B. WINN

5 ANCAB 19

Decided *August 25, 1980*

Appeal from the Decision of the Bureau of Land Management A–050903, AA–6701–D, 43 FR 14542 (Apr. 6, 1978).

Reversed in part.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Decisions

The Board is bound by statements of policy made by the Secretary of the Interior and contained in a published Departmental Manual Release or in a Secretarial Order published in the *Federal Register*.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where lands tentatively approved for conveyance under the Alaska Statehood

Act were leased by the State of Alaska pursuant to its open-to-entry lease program prior to enactment of the Alaska Native Claims Settlement Act, such lands must, pursuant to Secretary's Order No. 3029 (43 FR 55287 (1978)), be excluded from conveyance under the Alaska Native Claims Settlement Act because the leases and concurrent purchase options are valid existing rights leading to the acquisition of title.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

The policy expressed in Secretary's Order No. 3029 (43 FR 55287 (1978)) is applicable to all lands still within the Department's jurisdiction, even if the decision to convey such lands pursuant to the Alaska Native Claims Settlement Act was issued by the Bureau of Land Management prior to publication of Order No. 3029.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where tentative approval of land selections by the State of Alaska under the Statehood Act was rescinded by the Bureau of Land Management to permit conveyance of the same lands to a Native corporation under the Alaska Native Claims Settlement Act, and subsequently Secretary's Order No. 3029 (43 FR 55287 (1978)) found that third-party interests leading to fee title, created by the State of Alaska in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation, the Bureau of Land Management must reinstate tentative approval of the State of Alaska's selection of such lands so that the State of Alaska is able to grant title to such third parties as contemplated by Order No. 3029.

APPEARANCES: Daniel B. Winn, *pro se*; **M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Shelley J. Higgins, Esq., Assistant Attorney General, on behalf of the State of Alaska; A. Robert Hahn, Esq., Hahn, Jewell & Stanfill, on behalf of Seldovia Native Association, Inc.**

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This appeal involves the question of whether an open-to-entry lease issued by the State of Alaska prior to enactment of the Alaska Native Claims Settlement Act (ANCSA) on lands tentatively approved to the State of Alaska but subsequently withdrawn by § 11(a)(2) of ANCSA for possible Native selection is protected under ANCSA. The Board finds the question is answered in the affirmative by Secretary's Order No. 3029 (43 FR 55287, Nov. 27, 1978); that the Board is bound by published Secretarial Orders; and that Order No. 3029 is applicable to all lands still within the Department's jurisdiction. The Board concludes that the land underlying the open-to-entry lease here appealed must be excluded from conveyance to the Native corporation, and that the Bureau of Land Management must reinstate tentative approval of the State of Alaska's selection of such land so that the State of Alaska is able to grant title to the lessees as contemplated by Order No. 3029.

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JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Decision reversing in part the above-designated decision of the Bureau of Land Management.

PROCEDURAL BACKGROUND

On Dec. 29, 1959, the State of Alaska (State) filed a selection application for lands near the Native Village of Seldovia. On Oct. 4, 1960, Aug. 5, 1964, and Nov. 15, 1966, the Bureau of Land Management (BLM) issued decisions to tentatively approve conveyance to the State of certain lands within T. 7 S., R. 12 W., Seward meridian. Prior to Dec. 18, 1971, the State issued numerous open-to-entry (OTE) leases for tracts within the tentatively approved lands. On Dec. 18, 1971, § 11 of ANCSA withdrew for Native selection the lands surrounding the Village of Seldovia, including lands in the preceding State selection. On May 16, 1974, Seldovia Native Association, Inc. (Seldovia) filed village selection application AA–6701–D for lands located near the village, including lands within the prior State selections.

In two separate decisions, the BLM on Oct. 6, 1975, vacated the tentative approval previously given for conveyance of the subject lands to the State and on Oct. 9, 1975, approved conveyance of the lands to Seldovia, subject to valid existing rights therein. Seldovia had excluded the State OTE leases from its selection application, but the BLM, in its October 9 decision, identified and considered selected all the OTE leases excluded by Seldovia. The October 9 decision further specified that the lands approved for conveyance to Seldovia were unoccupied and did not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title.

The State appealed the Oct. 6, 1975 decision of the BLM vacating the tentative approval previously given for conveyance of the lands to the State and rejecting the State's selection application as to such lands. The State appeal was consolidated with the *Appeal of Seldovia Native Association, Inc.*, ANCAB VLS 75–15. Seldovia had argued as the basis for its appeal, *inter alia*, that the Oct. 9, 1975, Decision to Issue Conveyance (DIC) proposed the reservation of OTE leases without specifying the extent of the lessees' rights, and that the decision should be amended to specify that the only interest of the OTE lessees which survived ANCSA as a valid existing right is the enjoyment of the present lease term.

In deciding *Appeals of State of Alaska and Seldovia Native Associ-*

ation, Inc., 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75–14/75–15], the Board held that, pursuant to ANCSA, land previously tentatively approved for conveyance to the State was to be conveyed to Native corporations subject to OTE leases issued by the State, but that at the end of the lease term the lessee's rights would end, and the lessee could not enforce the option provided by Alaska statute to receive patent to the land because title to the land would have passed to the Native corporation upon conveyance and the State would never obtain title to convey to the lessee.

In response to, and as a partial reversal of, the position taken by the Board in *Appeals of State of Alaska and Seldovia Native Association, Inc., supra*, the Secretary of the Interior issued Order No. 3016, 85 I.D. 1 (Dec. 14, 1977). Therein, the Secretary determined that State OTE leases issued prior to the effective date of ANCSA on lands tentatively approved to the State, together with the lessee's statutory option to purchase the lands, were valid existing rights protected pursuant to § 14(g) of ANCSA. The Secretary declared that conveyances to Native corporations should be issued subject to such OTE leases, and that the purchase option could subsequently be exercised by the lessee against the grantee Native corporation. Nonetheless, the Secretary declared that the Order was not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official.

On Apr. 5, 1978, the BLM reissued as a single decision its decisions of Oct. 6 and Oct. 9, 1975. A portion of the lands which had been State selected and tentatively approved were found to have been properly selected under village selection application AA–6701–D. Accordingly, the tentative approval previously given for conveyance of lands to the State was rescinded in part, and the underlying State selection application rejected in part.

In its DIC, the BLM found that the subject lands

> do not include any lawful entry perfected under or being maintained in compliance with Federal laws leading to acquisition of title.
>
> In view of the foregoing, the surface estate of the following described lands * * * is considered proper for acquisition by Seldovia Native Association, Inc., and is hereby approved for conveyance pursuant to section 14(a) of the act [Alaska Native Claims Settlement Act].

Continuing, the BLM provided:

> The grant of lands shall be subject to:
>
> * * * * * *
>
> 5. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by section 14(g) of ANCSA, all of which are located in T. 7 S., R. 12 W., Seward Meridian:
>
> a. Open-to-entry leases
>
> * * * * * *
>
> 12. ADL 55132 located in SW¼ SW¼ of section 1.
>
> * * * * * *
>
> Secretarial Order 3016 of December 14, 1977, establishes the policy of the Department of the Interior to valid existing rights under ANCSA. However, the order

is not retroactive in that it does not affect the final decision previously rendered by the Alaska Native Claims Appeal Board, VLS 75–14 and 15.

On Apr. 28, 1978, Daniel B. Winn, lessee under OTE lease number ADL 55132, filed his Notice of Appeal from the above-referenced decision of the BLM. On Aug. 31, 1978, the Board suspended further action and briefing in this appeal pending reconsideration of Secretary's Order No. 3016, *supra*.

On Nov. 20, 1978, the Secretary of the Interior issued Order No. 3029, 43 FR 55287 (1978). Order No. 3029, *supra*, reaffirmed the Secretary's position in Order No. 3016, *supra*, that rights created pursuant to the State's OTE lease program are valid existing rights within the meaning of ANCSA. Revising his earlier position, though, that conveyances of land under ANCSA should be issued subject to previously-issued OTE leases, the Secretary declared that land covered by such leases should be excluded from conveyances to Native corporations. Also, the Secretary referred to the Solicitor the question of whether the Order should be applied retroactively to decisions of this Board and of the BLM issued prior to publication of Order No. 3029, *supra*.

The issue of retroactivity was decided Mar. 27, 1980. By publication of Departmental Manual Release Number 2246, 601 DM 2, the Secretary decided that the policy set forth in Order No. 3029, *supra*, would be applied retroactively. The Secretary also expressly reversed the decision of this Board in *Appeals of State of Alaska and Seldovia Native Association Inc.*, *supra*. The Secretary adopted the memorandum of the Solicitor dated June 2, 1979 (attached as Appendix 3 to 601 DM 2) as the position of the Department and decided that the policy stated in Order No. 3029, *supra*, would apply to all land still within the Department's jurisdiction.

The Board, on May 9, 1980, ordered the record of the appeal closed as of June 9, 1980, but allowed the filing of additional briefing prior to closing of the record. Seldovia and the State each filed an additional brief pursuant to the Board's order.

DECISION

[1] The Board has previously held that it is bound by statements of Secretarial policy contained in a Secretarial Order published in the *Federal Register*. *Appeal of Ouzinkie Native Corp.*, 4 ANCAB 3, 86 I.D. 618 (1979) [VLS 78–7]. The Board is also bound by statements of policy made by the Secretary and contained in a published Departmental Manual Release.

[2] Thus, the Board is bound by the Secretarial policy expressed in Order No. 3029, *supra*, and in Departmental Manual Release Number 2246, *supra*, which policy is dispositive of this appeal. Specifically, where lands tentatively approved for conveyance under the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. Prec. § 21 (1958), were

leased by the State pursuant to its OTE lease program prior to enactment of ANCSA, such lands must, pursuant to Order No. 3029, *supra*, be excluded from conveyance under ANCSA because the leases and concurrent purchase options are valid existing rights leading to the acquisition of title. Further, the OTE lessees are not precluded by the ANCSA conveyance from receiving patent for the leased land from the State.

[3] This policy is applicable to all lands still within the Department's jurisdiction, even if the decision to convey such lands under ANCSA was issued prior to publication of Order No. 3029, *supra*.

[4] Tentative approval of land selections by the State under the Statehood Act, *supra*, was rescinded by BLM to permit conveyance of the same lands to Seldovia under the Alaska Native Claims Settlement Act. Subsequently, Order No. 3029, *supra*, found that third-party interests leading to fee title, created by the State in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation. Accordingly, BLM must reinstate tentative approval of the State's selection of such lands so that the State is able to grant title to such third parties as contemplated by Order No. 3029, *supra*.

ORDER

It is therefore Ordered that the decision of the Bureau of Land Management here appealed is reversed to the following limited extent:

(a) The BLM's rejection of State of Alaska selection application A–050903 is reversed insofar as the rejection applies to lands covered by OTE lease ADL 55132 issued by the State of Alaska.

(b) Lands covered by OTE lease ADL 55132, shall be excluded from those lands to be conveyed to Seldovia Native Association, Inc.

All pending motions of the parties before the Board in this appeal not specifically addressed herein are denied.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

BRANHAM AND BAKER COAL CO., INC.

2 IBSMA 209

Decided *August 28, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Jan. 7, 1980, decision by Administrative Law Judge Tom M. Allen vacating Notice of Violation No. 79–2–55–21 (Docket No. NX 9–124–R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

The regulation, 30 CFR 715.11(b), requiring that authorizations to operate be available for inspection at or near the minesite obligates the permittee or mine operator to maintain those authorizations where they are readily available for review by an inspector during an on-site inspection. However, if the authorizations are not immediately available and the inspector wants to review them, he or she must specifically direct that they be produced within a reasonable time.

APPEARANCES: D. B. Kazee, Esq., Francis, Kazee and Francis, Prestonburg, Kentucky, for Branham and Baker Coal Co., Inc.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Procedural Background

On Aug. 28, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977,[1] two Office of Surface Mining Reclamation and Enforcement (OSM) inspectors inspected the Nos. 12 and 13 mines of Branham and Baker Coal Co., Inc. (Branham), located in Magoffin County, Kentucky, and issued Notice of Violation No. 79-2-55-21 charging Branham with a violation of 30 CFR 715.11(b), "[f]ailure to have authorizations to operate at or near the minesite."

Branham filed an application for review of the notice. Following a hearing held on Nov. 16, 1979, Administrative Law Judge Allen issued a written decision on Jan. 7, 1980, vacating the notice of violation. OSM filed a timely notice of appeal and both parties have filed briefs.

Factual Background

When the OSM inspectors arrived at Branham's mine on Aug. 28, 1979, they met the pit foreman, identified themselves, informed him they were there to make an inspection, and requested the mine authorizations. The pit foreman did not have them, but he called the mine superintendent on the truck radio and informed the inspectors that the superintendent was "on the other job" and would be "over there a little bit later" (Tr. 8). The inspectors started their inspection and the superintendent arrived 20 or 30 minutes later. OSM inspector Gary Francis told the superintendent that they needed the authorizations. The superintendent looked in his truck, but found only the mine map. Inspector Francis believed that the superintendent thought the authorizations were in the truck (Tr. 8). The superintendent told the inspec-

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

tors that the authorizations were in Branham's office in Prestonburg (Tr. 10). The inspector did not ask the superintendent to get the authorizations, nor did the superintendent offer to get them (Tr. 10). The inspectors had just about completed their inspection. They were ready to leave about 20 minutes after the superintendent arrived (Tr. 9).

It was approximately 16 miles from Branham's office in Prestonburg to the minesite (Tr. 21–23). There is radio communication between the site and the office (Tr. 23). If a call had been made, the permit package could have been delivered to the minesite in approximately 20 minutes (Tr. 23).

Discussion

The regulation that Branham was charged with violating, 30 CFR 715.11(b), states: "*Authorizations to operate.* A copy of all current permits, licenses, approved plans, or other authorizations to operate the mine *shall be available for inspection at or near the mine site.*" (Italics added). The preamble to the interim regulations contains the following language in response to comments concerning 30 CFR 715.11(b): "In order to ensure effective and efficient enforcement it is necessary for permits and related documents to be readily available to State and Federal officials in the course of their on-site inspections. However, the phrase 'at or near the mine site' is intended to include offices in nearby towns." [2]

OSM argues that 30 CFR 715.11 (b) requires the mine operator to make the authorizations available to the inspector during the course of the on-site inspection. OSM indicates that its policy concerning violations of 30 CFR 715.11(b) is to have inspectors request to see copies of authorizations at the beginning of their inspections, and a violation is written only if the documents are not furnished to the inspector during the inspection. If the documents are at a nearby location and are brought to the minesite during the inspection, a violation is not written.

OSM agrees that Branham's system was workable and that maintaining the records in Prestonburg did not violate the regulation (OSM Brief at 6). OSM also states that a violation would not have been written if Branham's employee had called Prestonburg and had the authorizations delivered. Therefore, OSM's contention is that the critical factor in this case is that Branham's employee failed to call the Prestonburg office.

[1] The regulation obligates the permittee or mine operator to maintain the authorizations where they are readily available to an inspector during the course of an on-site inspection. However, if the authorizations are not immediately available and the inspector wants to review them, he or she must specifically di-

[2] 42 FR 62642 (Dec. 13, 1977).

rect that they be produced within a reasonable time.

In this case there is no question that the authorizations were readily available in Branham's Prestonburg office. What was lacking was a specific direction by the inspector to produce them. The inspector testified that he did not instruct the superintendent to get the authorizations after the superintendent realized he did not have them with him. There is no evidence that the inspector explained the consequences of failing to produce the documents. Given the fact that the inspection was nearly complete, it would be reasonable for the superintendent to have concluded that the inspector no longer wanted the authorizations.

Therefore, while we agree with OSM that the responsibility for producing the authorizations is on the permittee or mine operator, an inspector must ask that they be produced within a reasonable time. Failure to produce them following a specific direction would constitute a violation of the regulation. There was no violation of 30 CFR 715.11(b) under the facts of this case.

The decision appealed from is affirmed.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

BETHLEHEM MINES CORP.

2 IBSMA 215

Decided *August 29, 1980*

Notice of appeal filed by Bethlehem Mines Corp., from an Apr. 3, 1980, decision of Administrative Law Judge Sheldon L. Shepherd in Docket No. CH 0-149-R, sustaining Notice of Violation No. 80-I-54-3 issued for failure to pass all surface drainage through a sedimentation pond at a rail loading facility in violation of 30 CFR 715.17(a) and 717.17(a).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection with—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

***"Surface coal mining operations."* A coal loading facility controlled by the same company that owns the mine supplying coal to it may conduct activities "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5.**

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

***"Surface coal mining operations."* A coal loading facility functionally and economically integrated with a commonly controlled coal mine located 2 miles away may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5.**

3. Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Permit area." During the initial regulatory program, when a facility otherwise included within the meaning of "surface coal mining operations" is not specifically covered by a permit, the "permit area" is at least coextensive with the disturbed area.

APPEARANCES: Henry Ingram, Esq., and R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Bethlehem Mines Corp.; William F. Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Bethlehem Mines Corp. (Bethlehem) has sought review of a decision of the Hearings Division sustaining a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement (OSM) for alleged noncompliance with the sedimentation pond requirements of the Surface Mining Control and Reclamation Act of 1977 [1] and 30 CFR 715.17(a) and 717.17(a). For the reasons discussed below, we affirm that decision.

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I, 1977).

Background

On Jan. 16, 1980, an OSM inspector visited a rail loading facility in Butler County, Pennsylvania. The sign at the entrance to the facility identified it as "Mine 91 Rail Loading Facility, Bethlehem Mines Corporation" and listed Bethlehem Mine's Mine Safety and Health Administration (MSHA) number (Exh. H; Tr. 23-24). The facility covered approximately 2.4 acres and consisted of coal stockpiles, a conveyor, a high-lift, and other equipment needed to load coal onto railroad cars (Tr. 80, 92).

The foreman at the tipple started to accompany the inspector and then decided he should contact Bethlehem's main office at Mine 91, located 2 miles away. He left the inspector, contacted Bethlehem, and then returned to the inspector (Tr. 9–10, 78). When the inspector found no sedimentation control structures at the tipple and evidence that coal and coal fines had left the disturbed area, the foreman requested that the resulting notice of violation, numbered 80–I–54–3, be served on Bethlehem officials at Mine 91 (Tr. 10–12). The inspector did this, and then returned to the tipple with those officials at their request to discuss abatement (Tr. 12, 15, 16).

The land on which the tipple is located is owned by the Bessemer & Lake Erie Railroad and leased by Bethelehem Mines Corp. (Tr. 75, 92). The facility is operated by Wayne W. Sell Corp., an independent trucking operation, under contract with Bethlehem Steel Corp. (Tr. 57–58, 73–74). That contract

describes the services provided by Sell as: "Operating Bethlehem Mines Corporation tipple in Clinton Township, Butler County, and loading of rail cars on the Bessemer & Lake Erie Railroad Company siding at that location." Coal was to be loaded in such quantities "as required" and at such times "as required" by the superintendent of Bethlehem Mines (Exh. 1).

In 1979 approximately 95 percent of the coal loaded through the facility came from Bethlehem Mine 91 (Tr. 63), while 100 percent of the coal loaded in 1980 came from that mine (Tr. 15, 63). When Mine 91 was placed on an indefinite standby status on Feb. 28, 1980, the tipple was also closed (Tr. 59, 73).

The decision below found that the tipple was subject to OSM regulation and sustained the notice of violation. Bethlehem appealed this decision and both parties filed briefs. Pursuant to a request made by Bethlehem, an oral argument was held on Aug. 7, 1980.

Discussion and Conclusions

In *Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980), the Board stated a two-part test for determining whether a coal processing or loading facility is a surface coal mining operation within the meaning of 30 CFR 700.5. That test involves whether the facility is operated "in connection with" a mine and is "at or near the minesite." We find that both of these tests are met in this case.

[1] The loading facility is operated in connection with the Bethlehem Mine 91. Although the connection is evidenced by many of the facts adduced at the hearing, the Board considers the following facts especially significant. The facility was under Bethlehem's control by virtue of the lease of the property from the railroad. The tipple was identified as being the rail loading facility for Bethlehem's Mine 91 through the sign at its entrance. The contract between Bethlehem and Sell indicated that Bethlehem considered that Sell was providing services at a Bethlehem facility. The foreman at the tipple paid clear deference to Bethlehem. When Mine 91 stopped production, the tipple was closed and employees there were laid off. Although the facility was neither owned nor operated by Bethlehem, as was the case in both *Drummond*, *supra*, and *Drummond Coal Co.*, 2 IBSMA 189, 87 I.D. 347 (1980), Bethlehem controlled the facility through its lease from the railroad and contract with Sell. *See Virginia Iron, Coal & Coke Co.*, 2 IBSMA 165, 171, 87 I.D. 327, 330 (1980). Such control, combined with Bethlehem's use of the tipple to load coal from Mine 91 and public advertising of a relationship between the mine and tipple through the sign bearing its MSHA number at the entrance is sufficient to establish that the facility is operated in connection with that mine within the meaning of 30 CFR 700.5.

[2] The facility is also located "at or near the minesite." It is only 2 miles away from the mine. The economic and functional integration and common control of the tipple and the mine are sufficient to bring the facility within the meaning of "near" in 30 CFR 700.5.

The findings that the tipple is operated in connection with Mine 91 and is near that mine make the facility a surface coal mining operation subject to OSM regulation. The decision below that the rail loading facility is subject to regulation by OSM is proper.

[3] Bethlehem also argued that because Pennsylvania does not issue permits for loading facilities, there is no "permit area." 30 CFR 715.17(a) and 717.17(a) require that surface drainage from the disturbed area be passed through a sedimentation pond before leaving the permit area. The notice issued to Bethlehem stated that discharges were not passing through a pond before leaving the "disturbed area." During the initial regulatory program, when a facility otherwise included within the meaning of "surface coal mining operations" is not specifically covered by a permit, the "permit area" is at least coextensive with the disturbed area.

Bethlehem raised other arguments going to the validity of the notice of violation that were addressed in the decision below. We see no reason to disturb the conclusions that each of these arguments was without merit.

Therefore, the Apr. 3, 1980, decision of the Hearings Division is affirmed.

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

SUNBEAM COAL CORP.

2 IBSMA 222

Decided *August 29, 1980*

Notice of appeal filed by Sunbeam Coal Corp., from a Feb. 4, 1980, decision of Administrative Law Judge Sheldon L. Shepherd in Docket No. CH 9-108-R sustaining violation No. 3 of Notice of Violation No. 79-I-18-11 issued for diverting the flow of an intermittent stream without regulatory authority approval in violation of 30 CFR 715.17(d)(1).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

The existence of an intermittent stream at the time of an OSM inspection and at subsequent inspections and the statements of mine officials that an intermittent stream existed before the initial inspection raise a rebuttable presumption that an intermittent stream subject to the requirements of 30 CFR 715.17(d) existed prior to mining.

2. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

Persuasive, uncontradicted evidence that the state regulatory authority considered a stream to be ephemeral before the granting of a permit, coupled with other evidence to the same effect, is sufficient under the circumstances to rebut the presumption that an intermittent stream existed prior to mining.

APPEARANCES: Leo M. Stepanian, Esq., Brydon, Stepanian & Muscatello, Butler, Pennsylvania, for Sunbeam

Coal Corp.; Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Sunbeam Coal Corp., (Sunbeam) has sought review of a decision issued on Feb. 4, 1980, by Administrative Law Judge Sheldon L. Shepherd sustaining Violation No. 3 of Notice of Violation No. 79–I–18–11.[1] The notice was issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act) [2] and alleged that Sunbeam had diverted the flow of an intermittent stream on the permit area without regulatory authority approval in violation of 30 CFR 715.17(d)(1). For the reasons discussed below, we reverse that decision.

Background

On May 16–17, 1979, the Office of Surface Mining Reclamation and Enforcement (OSM) inspected Sunbeam's McGarvey surface mining operation in Butler County, Pennsylvania. Mining had been completed on permit No. 179–37 (Tr. 67), but was continuing on permit No. 179–37A, a neighboring area. In inspecting the reclamation operations on permit No. 179–37, OSM discovered a stream flowing through the reclaimed area. Based upon his observations of the stream channel and the statements of the site superintendent, the inspector concluded that the stream flowed more than 30 consecutive days during the year and was, therefore, an intermittent stream under 30 CFR 710.5 (Tr. 68–69, 87, 93).[3] Because Sunbeam did not have permission from the regulatory authority to divert an intermittent stream, the inspector issued violation No. 3 of Notice of Violation No. 79–I–18–11 for a violation of 30 CFR 715.17(d)(1).[4] On four subsequent visits covering more than a month, the inspector found the stream always flowing in substantially the same manner (Tr. 75–86, 115).

The evidence at the hearing showed that Pennsylvania deter-

[1] Notice of Violation No. 79–I–18–11 originally contained four violations: Review of violation No. 1 was withdrawn with prejudice at the hearing by Sunbeam; violation No. 4 was vacated by OSM at the hearing; violation No. 2 was decided against Sunbeam by the Administrative Law Judge, but was not appealed.

[2] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[3] 30 CFR 710.5 reads:

"*Intermittent or perennial stream* means a stream or part of a stream that flows continuously during all (perennial) or for at least one month (intermittent) of the calendar year as a result of ground-water discharge or surface runoff. The term does not include an ephemeral stream which is one that flows for less than one month of a calendar year and only in direct response to precipitation in the immediate watershed and whose channel bottom is always above the local water table."

[4] 30 CFR 715.17(d)(1) reads in pertinent part: "Flow from perennial and intermittent streams within the permit area may be diverted only when the diversions are approved by the regulatory authority and they are in compliance with local, State, and Federal statutes and regulations."

mines whether a stream is an intermittent stream by referring to Geological Survey topographical maps (Tr. 71). These maps, however, do not indicate an intermittent stream that is less than 2,000 feet long or within 1,000 feet of a change of watershed (Tr. 73). The State was familiar with the area, which was a wooded hollow before mining, both because of work it was doing to seal some adjacent abandoned mine workings and from inspections of the permit area before granting the permit (Tr. 97–98, 110–111, 147). The permit as issued did not mention an intermittent stream (Tr. 70, 91, 94, 122).

Sunbeam's vice president/general manager testified that there was not an intermittent stream on the permit area before they began mining (Tr. 160). Flow from several areas above the permit area had been diverted as a result of the mining operation, increasing the amount of flow in the channel (Tr. 146–147). Sunbeam submitted a letter from a hydrogeologist with the Department of Environmental Resources of the Commonwealth of Pennsylvania indicating that, based on its knowledge of the area, Pennsylvania had considered the stream to be ephemeral under OSM regulations (Tr. 102–103; Exh. A).

The Administrative Law Judge found that the stream was intermittent and upheld the notice of violation issued for diverting its flow without regulatory authority approval. Sunbeam appealed this decision and both parties filed briefs.

Discussion and Conclusions

[1] OSM established a prima facie case that an intermittent stream existed prior to mining. The existence of an intermittent stream at the time of the inspection and on subsequent followup inspections raises a presumption that one existed before mining. OSM was also entitled to rely upon statements by the mine superintendent that an intermittent stream had existed before the inspection. *See Burgess Mining & Construction Corp.*, 1 IBSMA 293, n.4 at 296, 86 I.D. 656, n.4 at 657 (1979). *Cf. Island Creek Coal Co.*, 1 IBSMA 316, 320, 86 I.D. 724, 726 (1979). If this evidence had been uncontroverted, a finding that the stream had been intermittent before mining began would have been justified. *See James Moore*, 1 IBSMA 216, n.7 at 223, 86 I.D. 369, n.7 at 373 (1979).

[2] Sunbeam, however, did contest this evidence. It was shown that an intermittent stream was not indicated on Geological Survey maps. OSM countered this evidence with expert testimony that, under some circumstances, those maps do not show all streams that are intermittent under OSM regulations. OSM presented no testimony, however, that those circumstances existed in this case. Sunbeam's vice president/general manager testified that there was no stream in the area before mining began and that the drainage patterns were altered as a result of reclamation activities. Sunbeam testified that Pennsylvania was very familiar with the area because of work being done to seal adjacent

abandoned mine workings and because of the investigation of the area conducted prior to the granting of the permit. Sunbeam introduced a letter from Pennsylvania stating its reasons for defining the stream as ephemeral prior to mining. That letter shows knowledge of the specific area and of the definitions of intermittent and emphemeral streams.

OSM did not counter Sunbeam's evidence. Under the facts of this case, Sunbeam rebutted OSM's prima facie case that an intermittent stream existed prior to mining.

Therefore, the Feb. 4, 1980, decision is reversed and violation No. 3 of Notice of Violation No. 79–I–18–11 is vacated.

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

UNITED STATES
v.
ALBERT MARTINEZ ET. AL.

49 IBLA 360

Decided *August 29, 1980.*

Appeal from decision of Administrative Law Judge Sweitzer dismissing contest against the Martinez Nos. 1, 2, 3, and the south half of No. 4 placer mining claims. WY 38131.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability—Surface Resources Act: Generally

Sec. 3 of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 368, 30 U.S.C. § 611 (1976), declared that common varieties of sand and gravel are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter.

2. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Discovery: Marketability

The prudent man test of discovery has been satisfied where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The marketability refinement of the prudent man test of discovery requires that the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit.

3. Administrative Procedure: Burden of Proof—Administrative Procedure: Hearings—Mining Claims: Contests

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of inva-

lidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made.

4. Administrative Procedure: Hearings—Mining Claims: Contests—Mining Claims: Discovery: Marketability

Where there is not sufficient reason shown to disturb an Administrative Law Judge's finding that the prudent man-marketability test was met as of July 23, 1955, and continuously thereafter by mining claimants who extracted and profitably sold sand and gravel from the claims prior to that date and continuously thereafter, the decision will be sustained on appeal.

5. Administrative Procedure: Hearings—Mining Claims: Contests—Mining Claims: Discovery: Marketability—Rules of Practice: Hearings

The Board of Land Appeals will not order a further hearing in a mining claim contest case where a patent application has been filed merely because the evidentiary record is inadequate to invalidate the claims for lack of a discovery of a valuable mineral deposit, if the claimant is found to have met the discovery test.

APPEARANCES: Paul J. Hickey, Esq., Rooney, Horiskey, Bagley & Hickey, Cheyenne, Wyoming for contestees; Patricia Boleyn Walker, Esq., Office of the Solicitor, U.S. Department of the Interior, Denver, Colorado, for contestant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

The United States of America, contestant, appeals from the decision, dated Mar. 12, 1979, of Administrative Law Judge Harvey C. Sweitzer dismissing appellant's contest complaint against Albert and Maximilian Martinez, contestees, as to the Martinez Nos. 1, 2, 3, and the south half of No. 4, placer mining claims. The 4 claims, situated in sec. 24, T. 22 N., R. 86 W., sixth principal meridian, Carbon County, Wyoming, were located for sand and gravel on June 18, 1955, 35 days prior to enactment of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611 (1976), which removed common varieties of sand and gravel from mining location.

In 1966, BLM instituted contest proceedings against Martinez claim No. 4. On Mar. 27, 1970, the Hearing Examiner, L. K. Luoma,[1] found that there was a discovery of a valuable mineral deposit on the claim prior to July 23, 1955, and that the discovery continued to exist to the time of the decision.[2] Following submission of patent applications for all 4 claims, BLM issued a contest complaint against the claims Dec. 12, 1975. A hearing was held before Judge Sweitzer on Dec. 21 and 22, 1977, in Cheyenne, Wyoming.

The parties stipulated to the issues to be resolved at the hearing. They were:

1. Whether the lands included in the South Half of Martinez No. 1, the North

[1] The Civil Service Commission changed the title of Hearing Examiner to Administrative Law Judge on Aug. 19, 1972. 37 FR 16787.

[2] *United States* v. *Albert Martinez and Max Martinez*, Wyoming Contest No. 0252640, Mar. 27, 1970.

Half of Martinez No. 3, and the North Half of Martinez No. 4 placer mining claims are nonmineral in character in accordance with the application of the "Ten Acre Rule".

2. Whether the sand and gravel contained within the subject claims is locatable under the mining law, or whether the material is suitable only for fill purposes, road base or comparable use.

3. Whether the Contestees have discovered valuable minerals within the limits of Martinez No. 1, Martinez No. 2, and Martinez No. 3 placer mining claims.

4. If a discovery of a valuable mineral has been made within the limits of the subject claims, whether said discovery has continued from the date of location to the present time with regard to Martinez No. 1, Martinez No. 2, and Martinez No. 3 placer mining claims and from March 27, 1970, to the present time with regard to Martinez No. 4 placer mining claim.

Decision, p. 3.

At the hearing the Government mineral examiner testified that he examined the claims, studied the market and concluded that a prudent person would not be justified in spending time and money in developing these claims. The contestees produced two expert witnesses, a registered engineer and surveyor, and a consulting geologist, both of whom concluded, after examining the claims, that a person would have a reasonable prospect of developing a profitable mining operation on the claims. Albert Martinez, one of the contestees, testified that he and his brother Maxmilian had operated the claims continuously since June 1955, deriving most of their income from the claims. Judge Sweitzer ruled that the Government established a prima facie case of no discovery but the contestees satisfied their burden of showing by a preponderance of the evidence that a discovery of a valuable mineral deposit was made prior to July 23, 1955, and continued to the time of the hearing on all 4 claims, excepting the north half of Martinez No. 4 which contestees conceded is not mineral in character.

On appeal, appellant–contestant challenges the sufficiency of contestees' evidence to meet the contestees' burden of proof, pointing to their failure to provide a detailed cost analysis comparing expenses and earnings. Contestant argues that its expert used market figures supplied by the State of Wyoming and his own estimates of quantity in concluding that the claims could not be mined at a profit. Contestant asserts that contestees failed to supply the specific, probative evidence of a valuable mineral discovery necessary to overcome the Government's prima facie case. Contestant reiterates its contention that the south half of claim No. 1, and the north half of claim No. 3 are nonmineral in character. Finally, contestant asks for a further hearing in the event this Board finds the evidence inadequate to invalidate the claims. Contestant submitted no offer of additional proof in support thereof.

Contestees' answer to the statement of reasons pointed to Albert Martinez's testimony concerning his earnings from the claims and to an asserted lack of foundation for the cost analysis relied on by contestant as grounds to affirm the decision below. Contestees assert

that the evidence shows the claims have been operated at a profit for 24 years and that they have met the requirements of law for patents.

[1] Sec. 3 of the Surface Resources Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611 (1976), declared that common varieties of sand and gravel and certain other materials are not valuable mineral deposits under the mining laws (30 U.S.C. § 22 (1976)); *United States* v. *Coleman*, 390 U.S. 599 (1968). In order for a mining claim for a common variety of sand or gravel located prior to the Act of July 23, 1955, to be sustained as a claim validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the time of the Act, *Barrows* v. *Hickel*, 447 F.2d 80, 82 (9th Cir. 1971); *Palmer* v. *Dredge Corp.*, 398 F.2d 791, 795 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969), and reasonably continuously thereafter. *United States* v. *Taylor*, 19 IBLA 9, 82 I.D. 68 (1975); *State of California* v. *Doria Mining & Engineering Corp.*, 17 IBLA 380 (1974).

[2] The prudent man test requires a showing of minerals in sufficient quantity that: "[A] person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), *approved in Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905). The marketability refinement of the prudent man test requires that the claimant show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit. *United States* v. *Coleman*, *supra;* Solicitor's Opinion, 54 I.D. 294, 296 (1933), *approved in Foster* v. *Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959), and *recognized in Verrue* v. *United States*, 457 F.2d 1202 (9th Cir. 1972).

[3] In a mining claim contest, the Government has assumed the burden of going forward with sufficient evidence to establish a prima facie case. The testimony of a Government mineral examiner that he has examined the claim and found the mineral value insufficient to support a finding of discovery establishes the prima facie case and shifts the burden to the claimant to show by a preponderance of the evidence that a discovery has been made. *United States* v. *Taylor*, *supra*.

At the hearing, Larry Steward and Frederick Georgeson, BLM mineral specialists, testified for contestant. Most of the contestant's case was based on Steward's expert opinion. He examined the claims in 1974 and 1975. His testimony is summarized by Judge Sweitzer as follows:

> During part of these examinations he was accompanied by Albert Martinez, one of the Contestees. Mr. Martinez identified places on the claims where samples of the sand and gravel should be taken. Mr. Steward noticed numerous holes or pits on the various claims which were identi-

fied and noted on a map of the claims. (Ex. 4.) Some of the pits showed evidence of having had material removed from them recently, while others displayed no activity for a considerable period and some were essentially depleted of any sand and gravel deposits they may have contained. (Tr. 21–24, 29, 30.)

Mr. Steward testified to having taken "enough samples to get a representative idea of the sand and gravel deposits" located on the claims. (Tr. 30.) On the basis of his physical examination of those samples, Mr. Steward concluded that the materials from the deposit have no "special unique physical characteristics."[2] (Tr. 52.)

No samples taken from the 1974 and 1975 examinations were received in evidence nor was there evidence of any laboratory analyses concerning the quality of the mineral. Also, no scientific estimate of quantity of material was made by Mr. Steward on the Martinez claims nor on other competing deposits in the market area of the claims. (Tr. 63–66.) Nevertheless, Mr. Steward concluded that the mineral deposits on the claims were not essentially different from other deposits of sand and gravel in the area. *See e.g.* Tr. 61.

Mr. Steward testified to having made a market study in the area. He concluded that there was a market for sand and gravel for use as concrete aggregate, mortar sand, and fill material in the Rawlins, Wyoming, trade area, which would constitute the general market area for the contested claims. He indicated, concerning three representative years, that the Martinez operation, presumably the four contested claims, supplied 15 percent of this total market demand in the area of approximately 14,000 cubic yards in 1955; 7 percent of the market demand totaling approximately 20,000 cubic yards in 1966; and less than 2 percent of the market demand totaling 34,000 cubic yards for 1974. (Tr. 76–78.) The market figures were assertedly obtained from the State Inspector of Mines and the Ad Valorem Tax Division of the State of Wyoming. Further foundation as to how the market figures were arrived at was not developed on the record. The Martinez production figures were based upon examination of the Martinez records, Exhibits I, N–W. This information indicates that, in addition to the three representative years discussed above, some materials were marketed yearly from the time of the claims' location in 1955 until the time of hearing.

Mr. Steward gave his opinion concerning whether or not the claims could be operated at a profit. From his examination of the Martinez books and his knowledge of market conditions, he made an economic study of the claims. He concluded that, had the sole source of income been the sand and gravel from these claims, the Martinez operation would have lost 20 cents per cubic yard of material sold in 1955 and at least 80.7 cents per cubic yard in 1977. His conclusion was based upon an an allocation of equipment costs according to acquisition costs supplied by Albert Martinez (Tr. 80), labor costs in the mine on an assumption that one full-time employee would be required eight hours per day and five days per week (Tr. 91), and did not include indirect costs such as permits, taxes, or insurance. (Tr. 92–93.) The exact costs of labor and equipment depreciation were not entered in the record. On this basis Mr. Steward concluded that a person of ordinary prudence would not be justified in expending further time and monies with a reasonable prospect of success in developing a paying mine on the claims. (Tr. 123.)

Decision, pp. 4 and 5.

Appellant disputes one specific finding made by Judge Sweitzer, namely, that Mr. Steward did not

[2] As the claims were located prior to the Act of July 23, 1955, *supra*, it is not necessary that the materials have "distinct and special value" to remove them from the effect of the Act as it pertains to the location of common varieties of sand and gravel. That is, if the materials on the claims have sufficient quality to have been marketable from the time of their discovery to the present, the claims are not invalid for lack of "distinct and special value."

make a scientific estimate of quantity of material on the claims and on other competing deposits in the market area. It is apparent he did not estimate other competing deposits. However, he did estimate a quantity of sand and gravel material on the claims which is quite close to that of contestees' witness, except as to claim 3 (*see* quotation, *infra*). Thus, Judge Sweitzer's decision is corrected to reflect this estimate found at Tr. 99, as follows for each claim: 36,300 cubic yards on the Number 1 claim; 29,000 cubic yards on Number 2; 21,780 cubic yards on the Number 3; and 25,000 cubic yards on the Number 4. The Judge found that the contestant had established a prima facie case that there has been no discovery of a valuable mineral deposit on each of the claims based upon Steward's opinion. He found, however, that there was a lack of foundation as to the basis of the opiniion that the mining operations could not be profitable and stated that this detracts from the weight given to it. He found that contestees' evidence preponderated on the issue of marketability at a profit.

He summarized the contestees' evidence as follows:

Mr. Robert Jack Smith, a registered professional engineer and land surveyor from Rawlins, Wyoming, testified as an expert witness for Contestees. Mr. Smith surveyed the claims in 1955 and inspected the claims in 1969 and in 1977 and was familiar with the history and present condition of the contested claims. He estimated that at least the following quantities of sand and gravel existed on the claims at the time of the hearing: 30,000 cubic yards on Martinez No. 1; 31,000 cubic yards on Martinez No. 2; 38,000 cubic yards on Martinez No. 3; and 23,000 cubic yards on Martinez No. 4. (Tr. 207–208.) He testified that the Rawlins area was experiencing tremendous growth and that the demand for construction materials was very high. (Tr. 208–214.) He stated that based upon the existence of a market for the materials and the deposit on the claims being of a nature which lends itself to economical mining, he would advise a person to invest money and labor in developing the claims. (Tr. 216–217.) [*See also* Tr. 233–234.]

Mr. James Elliott also testified for Contestees. Mr. Elliott is a consulting geologist from Laramie, Wyoming, with an extensive educational background in hydraulics and soil mechanics. (Tr. 237.) He has analyzed the quantities and quality of sand and gravel deposit with the Wyoming Highway Department. (Tr. 238.) He examined excavations on all four claims in November 1977 and concluded that from the nature of the deposits a person would have a reasonable prospect of developing a profitable mining operation on the claims.

Mr. Albert Martinez, one of the two Contestees testified. He related that his initial discovery was in June 1955 and testified that he marketed sand and gravel from the claims prior to the effective date of the Act of July 23, 1955. He testified that he and his brother (the other Contestee) have been operating the claims continuously since their location (Tr. 281) and he estimated that he could continue the operation for an additional ten to fifteen years (Tr. 288).

Recent claim activities related by Mr. Martinez (and partially substantiated by written receipts) indicate rather significant operations. He stated that $15,732 had been derived from the claims for the first ten months of 1977. (Tr. 314 and Ex. W.) These figures reflect income before deduction of expenses. Overhead expenses were not recorded in Contestees' ledgers and net profit calculations were mere estimates. Nevertheless, Contestees estimated that most of their income came from operation of the claims through the

sale of sand and gravel and the hiring out of themselves and the equipment otherwise used to operate the claims. They did not submit expense records for claim operations nor did they allocate expenses and depreciation between the sale of materials and the hiring out or rental of equipment.

Since part of Claim No. 3 and all of Claim No. 4 are east of the river, it may not be mined year-round because of access problems. According to Mr. Martinez, material nevertheless may be marketed from this area by stockpiling material on the west side of the river when the river is low and easily fordable. (Tr. 285.)

Decision, pp. 5–7.

[4] The Judge's ultimate finding is that the contestees by their actions have shown that a profit has been made from mining the claims from 1955 to the time of the hearing and that they are justified as prudent men in the further expenditure of time and means in operating the claims. In reaching this conclusion, the Judge stressed that the best evidence of what a prudent man would do in the same or very nearly the same circumstances is what miners have or have not done over a period of years. *See United States* v. *Wichner*, 35 IBLA 240 (1978). Thus, he gave greater weight to the contestees' evidence that they had made a livelihood from the claims than to the mineral examiner's opinion which was based upon hypothetical calculations, without a full disclosure of figures to show the analysis (*see* Tr. 74–92). Such a weighing is appropriate.

We see no reason to overturn the Judge's findings in this case based on the record before us, despite appellants' contentions that the Judge did not give adequate weight to Steward's expert opinion. We cannot agree that the Judge misapplied the law of discovery and the burden of proof to the facts here. We note that there is no evidence of lack of good faith on the part of the contestees and no evidence showing any value in the land apart from the sand and gravel deposits within the claims. The evidence does not establish that the material was used for purposes for which nonlocatable mineral could be used which would not be considered as qualifying uses.

This case is different from many other sand and gravel cases where there has been little, if any, actual extraction of the materials before and for a long time after 1955. Here there were actual sales prior to July 23, 1955, and continuous sales each year thereafter to the date of the hearing. It is clear that the market demand for sand and gravel in the area is continuing and greatly increasing. Although by Steward's calculations, appellants' percentage of capture of the market demand in the area has diminished from 15 percent in 1955, to 7 percent in 1966, to less than 2 percent for 1974, this does not establish that a prudent man would not expect to market the sand and gravel profitably as of the time of the hearing. Steward admitted there is adequate access to the claims [3] (Tr. 130) and that the market for sand and gravel in the area has been increasing steadily (Tr. 74–78). There was unrebutted evidence by contestees that sand from the claims is suitable for mortar purposes, that other sources of sand and gravel in the area can-

[3] With the exception of the north half of claim No. 4.

not supply sand suitable for mortar as good as that from the claims, and that the projected market for mortar sand is excellent due to expected growth of population in the area and projected construction projects.

Much of the objection raised by appellant is with the lack of detailed evidence by contestees of the costs of their operations. The Judge explained the discrepancy between contestant's and contestees' evidence on profitability in large part because of a difference in accounting and cost allocation. He concluded that the contestant's costs were not appropriate because they were based on a more continuous and larger mining operation than that actually conducted by contestees. This made a great difference in apportioning labor costs and the amortization of equipment. Although the Judge found that contestees did not allocate expenses and depreciation between the sale of materials and the hiring out or rental of equipment, there was a rough estimate by Albert Martinez regarding income which would bear upon cost allocation. He testified that 90 percent of his income came from the contested claims (Tr. 283), with a profit sufficient to make a living (Tr. 309). In 1954 and 1955 about 10 percent to 15 percent of the sales of sand and gravel came from another property (Tr. 326, 366). He also testified he had purchased equipment from the income received from his sales of sand and gravel. The income from the contestees' total operations are reflected by the ledger books submitted as exhibits at the hearing (Exhs. I, N–W). Some expenses are reflected there, such as repairs on equipment, but not costs of equipment. While their bookkeeping system does not clearly show their net income for the years, it does evidence consistent sales with a reasonable gross income for a small sand and gravel operation since 1955.

Judge Sweitzer had the opportunity of personally observing the demeanor of the witnesses. He accepted and gave great weight to Albert Martinez's testimony that he and his family had made a good livelihood from the sand and gravel operations from the claims, and that the operation was profitable and could continue to be profitable. We see no adequate reason for disturbing the Judge's findings that the prudent man-marketability test was satisfied here and that the contestees have met their burden of proof for claims Nos. 1, 2, 3, and the south half of No. 4. Therefore, his decision is sustained on appeal. The evidence shows excavations of sand and gravel on the south half of No. 1 and north half of No. 3, refuting the assertion that the land is nonmineral in character. The evidence shows no excavations on the north half of claim No. 4; contestee conceded that the land was nonmineral in character and that determination will stand.

[5] The remaining issue concerns appellant's request that if the Board finds "the evidentiary record is inadequate to invalidate the claims, it is respectfully requested that the case be remanded for further hearing." The only justification

for this request is the fact a patent application for the claims has been filed. Appellant cites *United States* v. *Taylor*, *supra*, and also *United States* v. *Guzman*, 18 IBLA 109, 81 I.D. 685 (1974). In *United States* v. *Taylor*, we addressed the circumstances where a patent application has been filed in relation to the burden of proof question and stated, at 19 IBLA 25, 26, 82 I.D. 74:

> If a patent application has been filed, it is essential for this Department to determine whether all the requisites of the law have been met before patent may issue. If there has not been evidence presented on an essential issue, or issues, dismissal of the contest will not fulfill this Department's obligation to act "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron* v. *United States*, 252 U.S. 450, 460 (1920). Therefore, in a patent proceeding, it would be essential to order a further hearing to make a proper determination on the essential issues.

Appellant seems to be saying that in every patent application case if this Board cannot find the claim invalid because of a lack of discovery of a valuable mineral deposit, we must order a further hearing. This is incorrect and is not what *United States* v. *Taylor* holds. As the statement quoted above clearly shows, a hearing is essential if there has not been evidence presented on an issue, or issues, essential to determine the validity of the claim. Appellant has pointed to no such issue. It points only to deficiencies in contestees' case concerning the costs of their mining operation. This goes to an aspect of the discovery test. While specific detailed information was lacking, there was evidence that contestees' operations were profitable and expert opinion testimony that a prudent man could profitably operate the mine. The Judge weighed all of the evidence and made his findings on the prudent man-marketability test of discovery as of July 23, 1955, and as of the date of the hearing. If there had been no evidence to show the test was met as of either July 23, 1955, or through the date of the hearing, which are separate issues, a further hearing would be appropriate. However, evidence was presented relating to the application of the tests as of those dates and the time between those dates. If there is some other issue which has not been raised before in this contest proceeding which is essential to the patentability of these claims, it is incumbent upon contestant to take appropriate action to raise such an issue. None has been brought to our attention. Without more being shown to warrant a further hearing, we see no justification for ordering one in these circumstances. Therefore, the request for a hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from its affirmed.

JOAN B. THOMPSON
Administrative Judge

WE CONCUR:

JOSEPH W. GOSS
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

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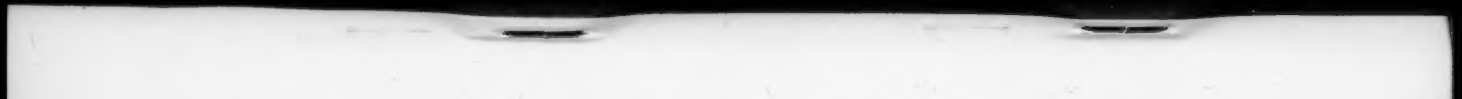
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